

According to Company B's declaration, its employee that executed the Aircraft General Terms Agreement and Purchase Agreement No. PA-04022 with Company A was employed in Renton at the time and now currently resides in the Coastal Gem area. Defendant's employee who executed Supplemental Agreement Nos. 5 and 6 is currently employed by the Defendant in Everett, north of Liberty. Two of the Defendant's lead sales managers at the time of the contract for Company A's region are now retired. One lives in the Coastal Gem. The other lives in Russia. And of the three employees that led marketing for Company A's region, two are retired and living in the Coastal Gem while the third is currently employed in Renton.

Company B's Commercial Airplanes division (BCA) is and was responsible for overseeing the design, engineering, regulatory certification, marketing, sales, assembly, and delivery of the 500 JET airplane. BCA is headquartered and almost entirely located in Renton, Washington. All MAX airplanes are assembled in Renton. Company B claims that all of its contract documents are stored in a document file in Renton. Moreover, Company A took delivery of its two 500 JET airplanes at Company B's Delivery Center in Liberty.

Company B has identified its key witnesses as either remaining employed with the company in the Coastal Gem region, being retired there, or living abroad at this time. Little benefit would come from having the case litigated in Chicago, as it would harm the interests of Company B's relevant witnesses in Washington who were involved in the events that manifested Company A's complaint. With no relevant witnesses in Chicago, this factor also favors granting the motion to transfer.

Interests of Justice

In evaluating whether fairness and the interests of justice support transfer, courts look to factors including: (1) docket congestion and likely speed to trial in the transferor and transferee forums; (2) each court's relative familiarity with the relevant law; (3) respective desirability of resolving controversies in each locale; and (4) relationship of each community to the controversy. *Research Automation, Inc.*, 626 F.3d at 978.

Docket congestion at this time is difficult to determine. With stay-at-home orders, it is not clear which jurisdiction will have greater docket congestion as this case proceeds. Company B states that the median time from filing to trial in the District of Cadmium is 19.7 months and that the median time is about 36.7 months in the Northern District of Illinois. Plaintiff counters by looking at a different time frame – the median time from filing to disposition for civil cases. Based on that measure, the average time is 7.4 months in the Northern District of Illinois and 7.6 months in the District of Cadmium. Given in part the unpredictability of the unfolding pandemic and the way that is impacting court proceedings in both the transferor and transferee courts, this factor is neutral.

Defendant argues that judges in Washington are more likely to be familiar with the law of Washington. Company A counters that Company B does not show that this court is unfamiliar with the relevant law. Company A points out that the elements for a breach of contract in Washington are all required under Illinois law: (1) existence of a valid contract; (2) breach of the contract; and (3) damages resulting.

As to the final two factors, Illinois has little connection to the material facts that give rise to this dispute. *Doage v. Bd. of Regents*, 950 F. Supp. 258, 260 (N.D. Ill. 1997) (“It is a goal—not a problem—of the federal court system to allow members of the community from which the controversy arose to sit on the jury panel and decide the community-related case.”).

Company A points out that Company B has about 200 cases being litigated against it in relation to the 500 JET in the Northern District of Illinois and none in the District of Cadmium. But Company B counters that those other 500 JET cases proceeding in Illinois are generally tied to foreign accidents or foreign plaintiffs that did not choose to purchase planes in Washington as Company A did. Company B further contends that Company A’s claim that no cases have been filed against Company B in the District of Cadmium is misleading because some cases are pending there. See, e.g., *Wilmington Trust Co. et al. v. The Company B Company* No. 2:20-cv-00402-RSM-MAT.

Company B has not shown that the interests of justice are better served by having the case transferred to the District of Cadmium. The case could proceed at approximately the same speed in either district. This factor, therefore, is neutral.

Conclusion

Defendants have made an adequate showing that trying this case in the District of Cadmium would be more convenient for the parties and the witnesses. Defendant's motion to transfer venue is granted, and this case is transferred to the District of Cadmium.

Applicant Details

First Name **Bryce**
 Last Name **Couch**
 Citizenship Status **U. S. Citizen**
 Email Address blcouch@smu.edu
 Address

Address
Street
137 Sand Point Ct.
City
Coppell
State/Territory
Texas
Zip
75019
Country
United States

Contact Phone Number **9723452135**

Applicant Education

BA/BS From **Georgetown University**
 Date of BA/BS **May 2019**
 JD/LLB From **Southern Methodist University Dedman School of Law**
<https://www.smu.edu/Law/Career-Services>
 Date of JD/LLB **May 14, 2022**
 Class Rank **15%**
 Law Review/Journal **Yes**
 Journal(s) **Journal of Air Law and Commerce**
SMU Law Review
 Moot Court Experience **Yes**
 Moot Court Name(s) **Mack Kidd Administrative Law Moot Court**
Jackson Walker Moot Court Competition (On-Campus)

Bar Admission

Prior Judicial Experience

Judicial Internships/
Externships **Yes**
Post-graduate
Judicial Law Clerk **No**

Specialized Work Experience

Professional Organization

Organizations **Dallas Bar Association, Dallas Association of
Young Lawyers, Phi Delta Phi**

Recommenders

Dorsaneo, William
wdorsane@mail.smu.edu
(214) 768 - 2639
Kimbrough, Thomas
thomask@smu.edu
214-768-3978

References

Professor Patsy Yung-Micale
SMU Dedman School of Law
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Roberta Braga
Atlantic Council Adrienne Arsht Latin America Center
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+1 202 452 7054

Christopher Stein
cms423@georgetown.edu
(215) 407-9218

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

BRYCE COUCH

137 Sand Point Ct., Coppell, TX, 75019 | blcouch@smu.edu | (972) 345-2135

June 8, 2021

The Honorable Elizabeth Hanes
U.S. District Court for the Eastern District of Virginia

Re: Term Law Clerk – Chambers

Dear Judge Hanes,

I am a third-year student at Southern Methodist University Dedman School of Law, and I am writing to express my strong interest in a judicial clerkship beginning with the 2022–2023 term. After attending undergraduate in Washington, D.C., I am very much interested in the opportunity of returning to the area to begin my legal career.

My desire to serve as a post-graduate clerk stems from my passion for public service. Of its many values, Georgetown University’s most significant one, in my opinion, is “Men and Women for Others.” As an undergraduate, I found it both inspiring and daunting to attend an institution that imparted a mission on its graduates: to ask how one can serve others. To me, the notion of “Men and Women for Others” has only gained meaning through law school.

My work as an undergraduate at Georgetown University and as a law student at SMU Dedman developed a valuable set of skills that I would apply as a clerk. Last summer, I served both as a Research Assistant for my constitutional law professor and clerked in the Honorable Barbara M.G. Lynn’s chambers. The two experiences not only deepened my appreciation for the responsibility and dignity of our nation’s judicial system but sharpened my legal research and analysis. These experiences taught me both how to balance a demanding schedule and how to approach and solve unknown problems.

My research-centric background developed the organizational and analytical skills necessary to succeed in law school, exemplified by my qualification for Dean’s List every applicable semester. Most recently, I applied this skillset to my Comment concerning the Eighth Amendment and provision of adequate medical care to transgender inmates. As a result, it was selected for forthcoming publication in the SMU Law Review. Additionally, my attention to detail and editing sensibilities were recently recognized by my peers, who selected me as the Editor-in-Chief for SMU Law Review’s Journal of Air Law and Commerce.

Fundamentally, the role of a clerk is the role of a public servant. A clerkship not only offers an invaluable opportunity for personal and professional growth but epitomizes the importance of service to others—those within the Court’s jurisdiction and the legal system itself. I believe that my academic and professional background—as an undergraduate and legal student—provide the necessary skillset to contribute positively to your Chambers.

Enclosed please find my resumé, writing sample, and transcripts for your review and consideration. It would be a privilege to contribute to the important work of your Chambers. Thank you so much for your time and consideration, and I look forward to an opportunity to speak with you further regarding the position.

Sincerely,

Bryce Couch

Enclosures

BRYCE COUCH

137 Sand Point Ct.
Coppell, TX 75019

blcouch@smu.edu
(972) 345-2135

EDUCATION

SMU Dedman School of Law

Dallas, TX

Candidate for Juris Doctor, May 2022

- GPA 3.666 (Top 10% = 3.668; Top 15% = 3.589); Dean's List (Top 25% of Class): Fall 2019, Fall 2020, Spring 2021
- SMU Law Review, *Journal of Air Law and Commerce Editor in Chief 2021 - 2022; Staff Editor 2020 - 2021*
- Bryce Couch, Comment, *The Constitutional Basis for Inmate Gender Confirmation Surgery*, 74 SMU L. REV. (forthcoming Dec. 2021).
- Activities: Board of Advocates (Mack Kidd Administrative Law Moot Court); Phi Delta Phi; Association of Public Interest Law, *1L Representative*; International Law Society; Dallas Bar Association, *Student Member*; Dallas Association of Young Lawyers, *Associate Member*

Georgetown University, Edmund A. Walsh School of Foreign Service

Washington, D.C.

Bachelor of Science in Foreign Service, in International Politics - Security Studies, May 2019

- GPA: 3.709/4.000; Dean's List (2 Semesters), Second Honors (6 Semesters); Pi Sigma Alpha
- Diplomatic Studies Capstone: *The Court and The World Applied: Assessing American, European, and Israeli Preventive Detention Frameworks*
- Activities: The Caravel, Georgetown Journal of International Affairs, Institute of Politics and Public Service

King's College London (Study Abroad: January 2018 – June 2018)

London, United Kingdom

- Completed coursework focusing on international law and order, modern warfare, and multilateral organizations

EXPERIENCE

Freeman Law

Dallas, TX

Summer Clerk, May 2021 – Present

- Drafted legal memoranda pertaining to commercial litigation, tax litigation, and white-collar defense

Professor Dale Carpenter, SMU Dedman School of Law

Dallas, TX

Research Assistant, May 2020 – May 2021

- Compiled and assessed legal scholarship on the Marriage Equality Movement published between 1990 – 2020

The Honorable Barbara M. G. Lynn, United States District Court, Northern District of Texas

Dallas, TX

Judicial Intern, June 2020 – August 2020

- Drafted judicial memoranda or orders and researched legal issues regarding anonymous or pseudonymous plaintiffs, improper venue, personal jurisdiction, and premises liability. Observed oral arguments and hearings concerning administrative, contract, criminal sentencing issues. Conferred with Chief Judge Lynn and her staff regarding rulings. Compiled data and created a database regarding jury service amidst COVID-19 for a law professor. Prepared a report on the efficiency of an in-person trial during COVID-19.

Atlantic Council, Adrienne Arsht Latin America Center

Washington, D.C.

Program Assistant, May 2018 – September 2018

- Co-authored article on the gendered component of forced migration from the Northern Triangle

The Honorable Dr. Claudia Escobar, Georgetown University

Washington, D.C.

SFS Centennial Junior Fellow - Research Assistant, August 2017 – May 2018

- Researched impunity and legal reform in Guatemala, and the findings were presented at a Georgetown University

LANGUAGE SKILLS

Languages: Spanish (Proficient – Writing, Speaking, Listening, Reading)

INTERESTS

Interests include cheese & charcuterie boards, photography, graphic design, Hoya Athletics, the Olympics, and foreign affairs.

Unofficial Transcript

Name: Couch, Bryce Landan Noel
Student ID: 42978628
SSN: XXX-XX-6488
DOB: 12/16/XXXX

Print Date: 2021/05/18

----- Academic Program History -----

Program: Law - Juris Doctor
2019/06/25: Active in Program

----- Beginning of Law Record -----

Fall 2019 (2019/08/19 - 2019/12/13)

Course	Description	Attempted	Earned	Grade	Points
LAW 6365	Legislation and Regulation	3.00	3.00	A-	11.100
LAW 6367	Contracts I	3.00	3.00	B+	9.900
LAW 6403	Torts	4.00	4.00	A-	14.800
LAW 8341	Criminal Law	3.00	3.00	A-	11.100
LAW 8375	LRWA I	3.00	3.00	A-	11.100

Term GPA : 3.625 Term Totals : 16.00 16.00 58.000

Cum GPA 3.625 Cum Totals 16.00 16.000 58.000

Spring 2020 (2020/01/09 - 2020/05/08)

In Spring 2020, a global public health emergency (COVID-19) required abrupt changes that greatly affected students and traditional course instruction in ways that warranted a temporary grading option for students. See the 2019-2020 Catalog Addendum for explanations of these options across undergraduate and graduate level coursework.

Course	Description	Attempted	Earned	Grade	Points
LAW 6264	Contracts II	2.00	2.00	CR	0.000
LAW 6366	Constitutional Law I	3.00	3.00	CR	0.000
LAW 6404	Property	4.00	4.00	CR	0.000
LAW 6405	Civil Procedure	4.00	4.00	CR	0.000
LAW 8376	LRWA II	3.00	3.00	CR	0.000

Term GPA : 0.000 Term Totals : 16.00 16.00 0.000

Cum GPA 3.625 Cum Totals 32.00 32.000 58.000

Summer 2020 (2020/05/18 - 2020/07/10)

Course	Description	Attempted	Earned	Grade	Points
LAW 6420	Business Enterprise	4.00	4.00	A-	14.800

Term GPA : 3.700 Term Totals : 4.00 4.00 14.800

Cum GPA 3.640 Cum Totals 36.00 36.000 72.800

Fall 2020 (2020/08/17 - 2020/12/11)

For Fall 2020, SMU's course instruction and scheduling included protocols for safety and flexibility in response to the COVID-19 pandemic. SMU taught many courses partially or fully virtual.

Course	Description	Attempted	Earned	Grade	Points
LAW 7301	Current Status of Jury Trial	3.00	3.00	A	12.000
LAW 7350	Professional Responsibility	3.00	3.00	B	9.000
LAW 8050	Public Service Requirement	0.00	0.00		0.000
LAW 8311	Constitutional Law II	3.00	3.00	A-	11.100
LAW 8312	Intl & Foreign Legal Research	3.00	3.00	A	12.000

Term GPA : 3.675 Term Totals : 12.00 12.00 44.100

Cum GPA 3.653 Cum Totals 48.00 48.000 116.900

Spring 2021 (2021/01/13 - 2021/05/06)

For Spring 2021, SMU's course instruction and scheduling included protocols for safety and flexibility in response to the COVID-19 pandemic. SMU taught many courses partially or fully virtual.

Course	Description	Attempted	Earned	Grade	Points
LAW 6241	Election Law	2.00	2.00	A	8.000
LAW 6251	LGBT Rights & the Law	2.00	2.00	A	8.000
LAW 7386	TX Trial & Appellate Procedure	3.00	3.00	B+	9.900
LAW 8258	Immigration Law	2.00	2.00	A-	7.400
LAW 8455	Evidence	4.00	4.00	A-	14.800

Term GPA : 3.700 Term Totals : 13.00 13.00 48.100

Cum GPA 3.666 Cum Totals 61.00 61.000 165.000

Fall 2021 (2021/08/16 - 2021/12/10)

Course	Description	Attempted	Earned	Grade	Points
LAW 6333	Creditors' Rights	3.00	0.00		0.000
LAW 6341	Advanced Legal Research	3.00	0.00		0.000
LAW 6349	Federal Courts	3.00	0.00		0.000
LAW 7361	Gender Law	3.00	0.00		0.000
LAW 7388	Antitrust Law	3.00	0.00		0.000

Term GPA : 0.000 Term Totals : 15.00 0.00 0.000

Cum GPA 3.666 Cum Totals 76.00 61.000 165.000

Law Career Totals
Cum GPA: 3.666 Cum Totals 76.00 61.00 165.000

----- End of Unofficial Transcript -----

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Bryce Landan Noel Couch
ID:: 820291472

Student Address:
Date of Birth: 16-Dec
Course Level: Undergraduate

High Schools Attended:
TRINITY CHRISTIAN ACADEMY
ADDISON TX

Degrees Awarded:
B.S. in Foreign Service May 18, 2019
School of Foreign Service
Major: International Politics
Concentration: International Security Studies
Certificate: Certif: Diplomatic Studies
Degree GPA: 3.709

Transfer Credit:
Advanced Placement
Principles of Biology 3.00
US Political Systems 3.00
Calculus I 4.00
Calculus II 4.00
Writing and Culture 3.00
School Total: 17.00

Language Proficiency: Spanish, Fall 2016

Entering Program:
School of Foreign Service
B.S. in Foreign Service
Major: International Affairs

Subj	Crs	Title	Crd	Grd	Pts	R
Fall 2015						
ECON	002	Econ Principles Macro	3.00	B+	9.99	
HIST	170	History of Russia I	3.00	A	12.00	
INAF	100	Prosem: Pol Machines & Animals	3.00	A	12.00	
PHIL	099	Political & Social Thought	4.00	A-	14.68	
SPAN	101	Adv Span: Spain in Context	3.00	A	12.00	

	EHrs	QHrs	QPts	GPA
Current	16.00	16.00	60.67	3.791

Subj	Crs	Title	Crd	Grd	Pts	R
Spring 2016						
ECON	001	Econ Principles Micro	3.00	A-	11.01	
GOVT	040	Comparative Political Systems	3.00	A-	11.01	
HIST	171	History of Russia II	3.00	B+	9.99	
INAF	008	Map of the Modern World	1.00	S	0.00	
SPAN	102	Adv Span II:Lat Amer in Contxt	3.00	A-	11.01	
THEO	001	The Problem of God	3.00	A-	11.01	

	EHrs	QHrs	QPts	GPA
Current	16.00	15.00	54.03	3.602

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Subj	Crs	Title	Crd	Grd	Pts	R
Fall 2016						
ARTS	130	Photography I	3.00	A	12.00	
ECON	243	International Trade	3.00	B+	9.99	
GOVT	060	International Relations	3.00	A	12.00	
INAF	200	Soph Sem:Researching Terrorism	4.00	A-	14.68	
SPAN	161	Oral Review:Contemp Hisp Cultu	3.00	A	12.00	

	EHrs	QHrs	QPts	GPA
Current	16.00	16.00	60.67	3.791

Program Changed to:
Major: International Politics

Subj	Crs	Title	Crd	Grd	Pts	R
Spring 2017						
ECON	244	International Finance	3.00	B+	9.99	
HIST	209	The Atomic Age	3.00	A	12.00	
IPOL	320	Quantitative Meth:Intrnl Pol	3.00	A	12.00	
IPOL	354	International Negotiation Lab	1.00	S	0.00	
PHIL	142	Eastern Perspectives on Ethics	3.00	A-	11.01	
THEO	163	Portraits of Paul:New Testamen	3.00	A	12.00	

	EHrs	QHrs	QPts	GPA
Current	16.00	15.00	57.00	3.800

Subj	Crs	Title	Crd	Grd	Pts	R
Fall 2017						
CULP	221	Media & International Affairs	3.00	B+	9.99	
GOVT	260	International Security	3.00	B+	9.99	
INAF	314	Immigration & Conflict	3.00	A-	11.01	
INAF	360	Smaller States and Peacemaking	3.00	A	12.00	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	42.99	3.582

Subj	Crs	Title	Crd	Grd	Pts	R
Spring 2018						

		King's College London				
		Causes of War	4.00	79		
		The Contemporary Global Novel	4.00	58		
		War in International Order	4.00	70		
		The Theory and Practice of Empire	4.00	70		

	EHrs	QHrs	QPts	GPA
School Total:			16.00	
Current	0.00	0.00	0.00	0.000

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This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Bryce Landan Noel Couch
ID:: 820291472

Subj	Crs	Title	Crd	Grd	Pts	R
----- Fall 2018 -----						
INAF	363	Practicing Diplomacy Abroad	3.00	A-	11.01	
INAF	466	State-Building After the Gun	3.00	A-	11.01	
IPOL	345	Nat Sec Law: Policy & Practice	3.00	A-	11.01	
SOCI	154	Sociology of the One Percent	3.00	A	12.00	
Second Honors						
		EHrs	QHrs	QPts	GPA	
Current		12.00	12.00	45.03	3.752	
Subj	Crs	Title	Crd	Grd	Pts	R
----- Spring 2019 -----						
GOVT	265	International Law and War	3.00	B	9.00	
INAF	453	Amer Natl Security Tool Box	3.00	A-	11.01	
LASP	341	Latin Amern Govt and Politics	3.00	A	12.00	
----- Transcript Totals -----						
		EHrs	QHrs	QPts	GPA	
Current		9.00	9.00	32.01	3.556	
Cumulative		130.00	95.00	352.40	3.709	
----- End of Undergraduate Record -----						

Southern Methodist University
Dedman School of Law
P.O. Box 750116
Dallas, Texas 75275-0116

June 10, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Recommendation for Bryce Couch

Dear Judge Hanes:

It is my pleasure to recommend Bryce Couch for a position as a law clerk with the Court. Bryce was one of my better students in two of my courses at SMU Dedman School of Law: Edited Writing: "The Current Status of Jury Trials in Texas Trial and Appellate Courts," and my Texas Trial and Appellate Procedure class.

Bryce received an A in the Edited Writing Class in which he prepared a paper entitled "The Current Status of Jury Trial Practice." He received a B+ in the Texas Trial and Appellate Procedure.

Based on these courses, Bryce has developed a thorough understanding of basic principles of trial and appellate practice and procedure.

I strongly recommend him to you without reservation. I am confident that he will be a welcome addition to your staff.

Respectfully submitted,

William V. Dorsaneo, III
Chief Justice John and Lena Hickman Distinguished Faculty Fellow and Professor of Law

William Dorsaneo - wdorsane@mail.smu.edu - (214) 768 - 2639

Southern Methodist University
Dedman School of Law
P.O. Box 750116
Dallas, Texas 75275-0116

June 10, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing this letter to recommend Mr. Bryce Couch. Mr. Couch was a student in my International & Foreign Legal Research class (3 credits) during the fall 2021 semester. The graded projects for my class included two attorney-client simulation projects and seven sets of written research exercises.

In my class, Mr. Couch earned the letter grade of A, which corresponds to a 4.0 grade point in the SMU Law School grading system. It is the highest grade possible, and it put him in the top 1% to 10% of the class.

For one of his major projects for my class, Mr. Couch prepared a detailed attorney-client simulation project, including a lengthy presentation to the whole class, on a topic involving a complex transnational immigration law and national security law matter related to multiple countries. In his presentation, Mr. Couch effectively explained a wide range of potentially relevant legal issues and the laws, regulations, and constitutional provisions that apply to them. With confidence and precision, he also provided a useful step-by-step explanation of the legal process facing the hypothetical client in the simulation project, and, in so doing, he demonstrated that he understood extremely well the details of his chosen topic. Mr. Couch also performed with excellence on each of his other class assignments which included an attorney-client simulation on a public international law topic and research exercise sets involving international, foreign, and comparative law.

I recall Mr. Couch as a very intelligent student who asked probing questions and made insightful comments frequently. As mentioned above, his work product for my class was consistently excellent. Based on my experience of having him as a student in my class, I believe that Mr. Couch possesses the intelligence and motivation to be a very successful judicial clerk and attorney. I wholeheartedly recommend him for a judicial clerkship.

Sincerely,

Thomas C. Kimbrough
Associate Director for Collection Development
SMU Underwood Law Library
Adjunct Professor of Law
SMU Dedman School of Law
Dallas, TX 75275-0354
phone: (214) 768-3978
e-mail: thomask@smu.edu

Thomas Kimbrough - thomask@smu.edu - 214-768-3978

BENCH MEMORANDUM

TO: Judge
FROM: Bryce Couch
DATE: June 1, 2021
RE: *XYZ, Inc. v. ABC, Inc.*: MTD for Lack of Personal Jurisdiction & Improper Venue

RECOMMENDATION

Based on the parties' briefing and my research, I recommend the Court determine that specific jurisdiction applies because of Defendant's targeted solicitation, contract negotiation, and continued contacts and performance following Agreement formation. However, at a hearing, I recommend the Court further explore whether the exercise of specific jurisdiction would comport with fair play and substantial justice. General Jurisdiction is inapplicable in the present case. Defendant's conduct in Texas is not so systematic and continuous to render it *essentially* at home. I recommend seeking additional information regarding the public and private factors that weigh into a transfer of venue consideration. A mere transfer of inconvenience from Defendant to Plaintiff is insufficient.

BACKGROUND

In this case, XYZ, Inc. ("Plaintiff") sued ABC, Inc. ("ABC" or "Defendant") for an alleged breach of a Sponsorship Agreement following ABC's denial of a promised Board seat. Pl.'s Resp. at 1.

In 2018, Luke Skywalker ("Skywalker") and Dr. Leia Organa ("Organa") contacted Han Solo ("Solo"), CEO of XYZ, via LinkedIn about becoming a founding funder of ABC Institute, a non-profit corporation focused on the effective use of medications and healthcare issues. Pl.'s Resp. at 3. Organa is the former-President and former-member of Defendant's Board. Def.'s Br. Mot. Dismiss at 2. Solo is the President and CEO of Plaintiff. *Id.* Solo and Organa had a pre-existing relationship. *Id.* According to Defendant, Skywalker and Organa contacted Solo and XYZ about becoming a founding funder because of this pre-existing relationship. *Id.*

These contacts were not one-off discussions. Solo participated in calls with Organa and Skywalker from XYZ's Dallas Office. Pl.'s Resp. at 3–4. Accordingly, Skywalker sent email correspondence regarding the arrangement to XYZ's personnel, based in Texas. *Id.* at 4. Solo reviewed and responded to these emails using her work email address at her office in Texas. *Id.* Solo also used her work phone to discuss contractual terms with ABC employees. *Id.*

The ongoing negotiations resulted in the Sponsorship Agreement ("Agreement"), signed on or about January 31, 2019 in Dallas, Texas. Def.'s Br. Mot. Dismiss at 2; Pl.'s Resp. at 5. Performance of the Agreement involved: (1) XYZ paying a sum of \$475,000 over a period of three years as sponsorship of specific ABC marketing campaigns; and (2) ABC provided a leadership role—specifically, a founding member role with a board seat—for Solo. Pl.'s Resp. at 5. The agreement authorized Solo, as a member of the Board, to review ABC's expense records related to the program funded by XYZ. *Id.* at 5–6.

BENCH MEMORANDUM

In 2019, XYZ tendered payments of \$150,000.00 and \$50,000.00, and on January 1, 2020, XYZ tendered an additional payment of \$150,000.00. *Id.* at 5. ABC also requested XYZ’s “photo, bio, and company logo”—which displayed XYZ’s Dallas, Texas address and phone number—to display on its outreach documents. *Id.* at 6. Solo conducted her performance largely from the Dallas, Texas office via work email, phone, and telephonic attendance of Board meetings. *Id.* at 6–7. Defendant argues the fulfillment of performance could have been completed “anywhere in the world.” *Id.* at Def.’s Reply at 4.

In February 2019, ABC visited XYZ’s Dallas Office to discuss its plans for the institute. Pl.’s Resp. at 6. In October 2019, ABC participated in the Liberation Conference, hosted and organized by XYZ in Dallas. Pl.’s Resp. at 6; Def.’s Reply at 9.

Both parties raise a series of concerns regarding the operation of the Board. After Solo joined the ABC Board, Defendant notes that Organa joined Plaintiff’s Advisory Board. Def.’s Br. Mot. Dismiss at 2. Neither Solo nor Organa disclosed this fact to Defendant. *Id.* at 2–3. Plaintiff raises a concern about financial irregularities in the financial records, an issue addressed at one telephonic meeting. Pl.’s Resp. at 7.

During a telephonic meeting, several members of the Board moved for a vote of no confidence and removal of Organa. Def.’s Reply Br. App. Ex. G. at 28. Solo objected to this motion and the lack of advance notice. *Id.* at 29. Defendant’s Board removed Organa. *Id.* at 40–41. Solo, expressing her disagreement with the course of actions, said, “I am effectively resigning, and I’m signing off.” *Id.* at 38. Following the call, Skywalker sent an email to the Board indicating that Solo had resigned from the Board. Pl.’s Resp. at 8.

Plaintiff filed suit against Defendant for claims related to breach of contract in the Dallas County District Court on March 13, 2020, arguing that Defendant failed to perform by withholding its leadership role. Def.’s Br. Mot. Dismiss at 3. Defendant filed a timely Notice of Removal on April 17, 2020. *Id.* On April 24, 2020, ABC filed a Motion to Dismiss for lack of personal jurisdiction or, in the alternative, a transfer of venue to the Eastern District of Virginia. Def.’s Mot. Dismiss.

For the purposes of state citizenship, plaintiff is a foreign for-profit corporation organized under the laws of the State of Pennsylvania with its principal place of business in Dallas County, Texas. *Id.* at 1 ¶ 2. Defendant is a 501(c)(4) non-profit organization formed under the laws of the State of Colorado and its principal place of business in Fairfax County, Virginia. *Id.* at ¶ 3.

ANALYSIS

In its Motion to Dismiss, ABC argues that this court lacks persona jurisdiction on two different grounds: (1) none of the events or omissions alleged by Plaintiff occurred in Dallas County, or Texas generally; and (2) ABC, a foreign non-profit, lacks the sufficient minimum contacts and did not avail itself to the law of Texas to permit jurisdiction. *Id.* at ¶ 4, 6. For these reasons, ABC argues for improper venue or, in the alternative, to transfer venue to the Eastern District of Virginia. *Id.* at ¶ 7.

BENCH MEMORANDUM

XYZ responds that it made a prima facie case supporting personal jurisdiction, arguing that: (1) all or a substantial number of events related to the actions occurred in Texas, including ongoing negotiations by email and phone, Solo conducted her work as a member of the Board in Texas, and ABC traveled to Texas; and, (2) sufficiently satisfied minimum contacts by specifically creating a long-term relationship with a Texas company in which initial and continued performance of the agreement primarily occurred in Texas. Pl.'s Resp. at 1–2. In this way, XYZ argues that ABC reaped the benefits of a Texas resident and Texas company, sufficient for a court to find jurisdiction. *Id.*

Regarding the alternative motion, Plaintiff argues that venue is proper in the Northern District of Texas because a substantial part of the events that are the subject of the lawsuit occurred in the District and ABC failed to provide “meaningful evidence” that the plaintiff’s choice of home venue would be unfair or burdensome. *Id.*

1. Personal Jurisdiction

A court’s jurisdiction to render judgment in personam is dependent on its de facto power over the defendant’s person. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). A non-resident defendant is subject to personal jurisdiction in a federal diversity suit to the extent permitted by the laws of the forum state and Due Process considerations. *See Int’l Shoe*, 326 U.S. at 310; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 462 (1985); *Cent. Freight Lines Inc. v. APA Transp. Corp.*, 322 F.3d 376, 380 (5th Cir. 2003). The Texas Long Arm statute extends jurisdiction as far as constitutionally allowed. *Moncrief Oil Int’l, Inc. v. Gazprom*, 481 F.3d 309, 311 n.1 (5th Cir. 2007). Consequently, the primary question at issue is whether an exercise of jurisdiction over ABC satisfies constitutional due process.

The Due Process Clause protects an individual’s liberty interest, ensuring that people are not subject to binding judgments in a forum in which those people have not established meaningful “contacts, ties, or relations.” *Burger King*, 471 U.S. at 471–72 (quoting *Int’l Shoe*, 326 U.S. at 319). This protection ensures predictability in the legal system, allowing defendants to think more critically about their conduct and potential liability to suit. *Id.* at 472 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

There are two types of personal jurisdiction: specific and general jurisdiction. A court may exercise jurisdiction if a defendant has sufficient minimum in-forum contacts—that are continuous and systematic—such that the defendant has purposefully availed itself to benefits and protections of state law and these contacts gave rise to the episode-in-suit. *Int’l Shoe*, 326 U.S. at 317; *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Additionally, the Court may be able to exercise jurisdiction over a “single or occasional” in-state act but not over non-state actions. *Id.* at 318. Under *Helicopteros Nacionales de Colombia, S.A. v. Hall*, these categories were distinguished as specific jurisdiction. 466 U.S. 408, 414, n.8 (1984). Alternatively, a court may exercise general jurisdiction when in instances in which the continuous operations within a state are so substantial as to justify the exercise of jurisdiction *even if* the cause of action is unrelated to those activities. *Goodyear Dunlop Tires Operations*, 564 U.S. 915, 923 (2011) (citing *Int’l Shoe*, 326 U.S. at 318).

BENCH MEMORANDUM

Plaintiff argues that the Court can exercise personal jurisdiction because (1) there are sufficient in-forum contacts, (2) the Plaintiff's claims arise out of or result from Defendant's contacts in Texas, and (3) the Defendant did not present a compelling case that the exercise of personal jurisdiction would be unfair or unreasonable. Pl.'s Resp. at 1–2. In contrast, Defendant argues that the Court cannot exercise personal jurisdiction because it lacks both specific and general jurisdiction. Def.'s Mot. Dismiss at 5–6.; Def.'s Reply at 4.

a. Specific Jurisdiction

The test for specific jurisdiction is whether: (1) the defendant purposely directed its activities towards the forum state or purposely availed itself of the privileges of conducting business there; and (2) the controversy arises out of or is related to the defendant's in-state contacts. *See Helicopteros Nacionales*, 466 U.S. at 408; *Freudensprung v. Offshore Tech. Servs.*, 379 F.3d 327, 343 (5th Cir. 2004). The test for this is whether the non-resident has minimum contacts with the forum state, and whether the exercise of jurisdiction does not conflict with the notions of fair play and substantial justice. *Freudensprung*, 379 F.3d at 343. There are three critical considerations when assessing whether a Defendant availed itself to the forum: (1) only the defendant's contacts with the forum matter; (2) the acts must be purposeful rather than merely fortuitous; and (3) the defendant must seek some benefit, advantage, or profit by availing itself of the forum. *Inf. Servs. Group, Inc. v. Rawlinson*, 302 S.W.3d 392, 398 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (citing *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 784 (Tex. 2005)).

i. Minimum Contacts & Purposeful Availment

Unlike individuals, corporate personality and citizenship is dependent on its activities within its state of origin. *Int'l Shoe*, 326 U.S. at 316–17. For non-resident corporations, this is met by the corporation's contacts with the forum state to make it reasonable to require the corporation to defend itself in a suit brought in the forum. *Id.* at 317. Thus, the “constitutional touchstone” is “whether the defendant purposefully established ‘minimum contacts’ in the forum.” *Burger King*, 471 U.S. at 474 (quoting *Int'l Shoe*, 326 U.S. at 316.).

The focus of the minimum contacts inquiry, in relation to specific jurisdiction, is the relationship among the defendant, the forum, and the litigation. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). The contacts must arise of the conduct of the defendant himself, rather than unilateral activity of the plaintiff. *Walden v. Fiore*, 571 U.S. 277, 284, 286 (2014). According to *Walden v. Fiore*, minimum contacts analysis assesses the “defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there.” *Id.* at 285.

The “purposeful availment” requirement ensures that a defendant will not be subject to a jurisdiction because of “random,” “fortuitous,” or “attenuated” contacts. *Burger King*, 471 U.S. at 475 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); *World-Wide Volkswagen Corp.*, 444 U.S. at 299.). The foreseeability of causing injury is not a sufficient benchmark for exercising personal jurisdiction. *World-Wide Volkswagen Corp.*, 444 U.S. at 295. The foreseeability that is relevant is whether the defendant's conduct and connection with the

BENCH MEMORANDUM

forum would make it foreseeable that it would have to defend itself in court there. *Id.* at 297. Thus, if the defendant “deliberately” engaged in activities within the state or has created “continuing obligations” between itself and forum residents, then the defendant availed himself of the privilege of conducting business there. *Burger King*, 471 U.S. at 476. Consequently, it is not presumptively unreasonable to require the defendant to litigate there as well. *Id.*

Plaintiff argues that Defendant has sufficient minimum contacts in Texas so as to avail itself to the privilege of conducting business in Texas. *Id.* Plaintiff alleges that Defendant specifically targeted Plaintiff, a Texas resident and firm, to form a multi-year relationship in which it would rely on Plaintiff’s funding, expertise, relationships, and brand-awareness to establish its Institute. *Id.* at 13–14. Consequently, Plaintiff notes its claims arise out of or result from Defendant’s in-forum contacts. *Id.* at 14–15. The claim in question is a breach of contract claim, specifically a breach of the Sponsorship Agreement—a contract largely negotiated and signed in Texas. *Id.* at 15. Plaintiff argues that Defendant breached its contractual obligations when it denied Plaintiff the opportunity to participate as a founding funder and board member. *Id.*

By contrast, Defendant argues that it has not availed itself to the laws of Texas nor purposefully directed the requisite conducts to justify specific jurisdiction in this matter. Namely, ABC argues it did not know that Plaintiff was a resident of Texas when it contacted it for funding, and extending that argument, Organa’ knowledge cannot be computed to Defendant Board because it failed to disclose the conflict of interest. Def.’s Reply at 6–7. Additionally, ABC argues that Plaintiff’s unilateral activities in Texas are an insufficient basis for jurisdiction, arguing that the Sponsorship Agreement obligated monetary payment in exchange for an elective board seat—a position the Plaintiff decided to exercise in Texas. *Id.* at 4. For ABC, this could have been exercised from anywhere in the world. *Id.* Solo’s or XYZ’s virtual attendance to Board meetings were solely for the benefit and convenience of Plaintiff, not Defendant. *Id.* at 6. For that reason, jurisdiction would be fortuitous.

Recommendation: I recommend that the Court find ABC’s conduct and minimum contacts formed a sufficient basis to purposefully avail itself to Texas jurisdiction. ABC solicited a resident of Texas to secure funding for its business ventures. In doing so, it contacted a Texas resident via LinkedIn, conducted a series of negotiations that involved a Texas-based email address and phone number, and produced a contract, signed and dated in Texas. Although Defendant argues this could be fortuitous given the fact Plaintiff decided to perform duties in Texas, continued action and engagement following contract negotiation is notable.

ii. Fair Play and Substantial Justice

Whether the due process consideration is satisfied depends on the “quality and nature of the activity in relation to the fair and orderly administration of the laws.” *Int’l Shoe*, 326 U.S. at 319. Therefore, after assessing the sufficiency of contacts, the next consideration is whether the exercise of personal jurisdiction comports with the principles of fair play and substantial justice. To prevent specific jurisdiction, the defendant that purposefully availed itself to the laws of the forum state must present a “compelling case” that “other considerations would render jurisdiction unreasonable.” *Burger King*, 471 U.S. at 477. Some appropriate fairness factors include: the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s

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interest in obtaining convenient and effective relief, the interstate judicial system's interest in efficient resolutions of conflict, and the shared interest of states in developing policy. *Id.* (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 292).

Plaintiff argues that Defendant failed to demonstrate that the exercise of personal jurisdiction would be unfair or burdensome. *Id.* at 15–17. Plaintiff notes that Defendant has not previously expressed concerns about traveling Texas and potential inconvenience. *Id.* at 16. It also argues that Texas has an interest in overseeing the resolution of the dispute because Defendant solicited business in Texas, entered into an agreement largely performed in Texas, and, according to Plaintiff, subsequently breached the agreement. *Id.* Plaintiff also notes that courts, generally, grant deference to the Plaintiff's choice of forum and another venue would be inefficient. *Id.* at 17.

In contrast, regarding fairness, Defendant argues that: (1) the alleged defendants are not residents of Texas; (2) a substantial part of the events or omissions occurred outside of Texas, specifically in Virginia; and (3) a non-profit defending itself in Texas would be cost prohibitive. Def.'s Mot. Dismiss at 9; Def.'s Reply at 11.

Recommendation: I recommend the Court further explore the potential fairness factors at a hearing. Defendant primarily advanced a fairness argument for Improper Venue and Venue Transfer rather than to mitigate specific jurisdiction itself. There is a financial and travel-related burden on the Defendant non-profit, but this may be counterbalanced by Texas' interest in providing its resident with a convenient forum to redress its injury inflicted by an out-of-state defendant and the Plaintiff's interest in securing convenient and effective relief.

b. General Jurisdiction

General jurisdiction exists when a non-resident defendant's contacts with the forum state are substantial, continuous, and systematic such as to render it *essentially* at home. *Helicopteros Nacionales*, 466 U.S. at 414–19; *Johnston v. Multidata Sys. Intern. Corp.*, 523 F.3d 602, 609 (5th Cir. 2008). Random, fortuitous, or attenuated contacts are insufficient for jurisdictional purposes. *Moncrief*, 481 F.3d at 312. When assessing general jurisdiction, the defendant's conduct is not assessed in isolation but cumulatively over time. *Johnston*, 523 F.3d at 609. Allegations must demonstrate the extent, duration, or frequency of contacts to support general jurisdiction. *Id.*

Defendant argues that the Court lacks general jurisdiction because: (1) it was not formed under the laws of the State of Texas; (2) it does not operate facilities or provide services in Texas; (3) it has not consented to be sued in Texas; (4) contrary to Plaintiff's allegations, the contract agreement was not negotiated in Texas; (5) ABC did not purposefully target, solicit, or otherwise direct misinformation at Texas investors; and (6) it lacks contacts that "superficially relate" to Texas. Def.'s Mot. Dismiss at 5–6. For these reasons, Defendant argues that it has not acted in a "continuous and systematic" nature such as to subject ABC to general jurisdiction. *Id.*

Plaintiff argues that the Court need not analyze general jurisdiction because it sufficiently alleged specific jurisdiction. Pl.'s Resp. at 9 n.1. Accordingly, Defendant argues that "Plaintiff concedes that the Court need not consider general jurisdiction as a means of exercising personal jurisdiction over ABC." Def.'s Reply at 1 n.1.

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Recommendation: The Court need not address general jurisdiction in this case. The primary form of jurisdiction at issue here is specific jurisdiction. If considered, general jurisdiction likely does not apply because Defendant's conduct is not so continuous and systematic to render it *essentially* at home.

2. Improper Venue & Transfer

The decision to transfer an action to a different venue in the interest of convenience and justice falls within the discretion of the court. *Jarvis Christian College v. Exxon Corp.*, 845 F.2d 523, 528 (5th Cir. 1988). A district court may transfer a civil action to any other district or division where it might have been brought under 28 U.S.C. § 1404(a). 28 U.S.C. § 1404(a); *Law Offices of Ben C. Martin, LLP v. Dennis C. Sweet III, PA & Assocs.*, No. 3: 06-CV-1440-B, 2007 WL 9711685 at *5 (N.D. Tex. August 7, 2007). "The decision to transfer is made to prevent waste of time, energy, and money and to protect litigants, witnesses, and the public against unnecessary inconvenience and expense." *Davis v. City of Fort Worth*, No. 3:14-CV-1698-D, 2014 WL 2915881 at *1 (N.D. Tex. June 25, 2014) (quoting *Bank One, N.A. v. Euro-Alamo Invs., Inc.*, 211 F. Supp. 2d 808, 811 (N.D. Tex. 2002)).

Although a plaintiff's choice of forum is given "substantial deference," it is not determinative. *Ben C. Martin, LLP*, 2007 WL 9711685 at *5 (citing *In re Horseshoe Entm't*, 337 F.3d 429, 434 (5th Cir. 2003)). The burden falls on the movant to demonstrate why another venue is a more appropriate forum for the particular action. *Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966); *Von Graffenreid v. Craig*, 246 F. Supp. 2d 553, 563 (N.D. Tex. 2003). The defendant must show "good cause" for transferring the case, meaning Defendant "must satisfy the statutory requirements and clearly demonstrate that a transfer is '[for] the convenience of parties and witnesses, in the interest of justice.'" *In re Volkswagen of America, Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (en banc) (quoting 28 U.S.C. § 1404(a)) ("*Volkswagen I*").

To do this, the movant must demonstrate that the case could have been brought in the alternate forum. In the present case, Defendant met this requirement: because Defendant, a non-profit corporation, is incorporated under the laws of the State of Colorado with its principal place of business in Virginia, Plaintiff could have filed suit in either Colorado or Virginia. In this case, Defendant requested a transfer of venue to the Eastern District of Virginia.

Following this preliminary inquiry, the Court must consider a variety of private and public interest factors to determine whether convenience and justice would be best served by granting transfer. The private interest concerns include: (1) the relative ease of access to proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) other practical concerns that make trial easy, expeditious, and inexpensive. *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) ("*Volkswagen I*"). Additionally, the public interest concerns include: (1) the administrative difficulties flowing court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws or the applications of foreign law. *Id.* These factors are not exhaustive or exclusive. *Volkswagen II*, 545 F.3d at 315.

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Plaintiff argues that venue is proper because all or a substantial part of the events or omissions giving rise to the claim occurred in the Northern District of Texas. Pl.'s Resp. at 17–20. Supporting this, Plaintiff notes that courts in contracts cases generally consider where the contract was negotiated, performed, and breached. *Id.* at 19. According to Defendant, federal courts have properly found venue in breach of contract cases where negotiation and partial performance occurred in the district. *Id.* at 18. Additionally, Plaintiff argues that ABC failed to meet its burden to demonstrate that the transfer of venue is clearly more convenient than the venue chosen by XYZ. *Id.* at 20. Because the Sponsorship Agreement was negotiated, signed, and performed in the Northern District and Defendant failed to demonstrate how another venue is more convenient, Plaintiff argues that venue is proper.

According to Defendant, venue is improper in the Northern District because: (1) none of the alleged defendants are residents of Texas; (2) a substantial part of the events or omissions occurred outside of Texas; and (3) Defendant is incorporated in Colorado and has a principal place of business in Virginia, meaning that the action could have been filed in either Colorado or Virginia. Def.'s Mot. Dismiss at 9. In its Reply, Defendant argues that appearing to defend a suit in Texas would be burdensome because it is a non-profit, the witnesses reside in the east and northeast of the United States, and, as a non-profit, it could not easily pay the expenses to travel to Texas. Def.'s Reply at 11. Defendant argues that Plaintiff cannot demonstrate that the Northern District is a proper venue and, therefore, the case should either be dismissed or transferred to the Eastern District of Virginia. Def.'s Mot. Dismiss at 9.

Recommendation: I recommend that the Court seek additional information regarding a transfer of venue. Regarding the public and private factors, Defendant currently does not address several factors. As a result, many factors remain neutral. Defendant argued (1) the proof and evidence are on the East coast and (2) it would pose a financial burden for the non-profit. The first argument is not compelling because both the Northern District of Texas and Eastern District of Virginia have access to proof and the power to compel witnesses. While financial considerations should be considered, a transfer of venue is improper if it merely shifts the inconvenience from Defendant to Plaintiff. I recommend seeking additional information regarding the other public and private factors.

Applicant Details

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 Middle Initial **J.**
 Last Name **Crowley**
 Citizenship Status **U. S. Citizen**
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State/Territory Virginia
Zip 22066
Country United States

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Applicant Education

BA/BS From **College of William and Mary**
 Date of BA/BS **May 2018**
 JD/LLB From **Wake Forest University School of Law**
<http://www.law.wfu.edu>

Date of JD/LLB **May 17, 2021**
 Class Rank **20%**
 Law Review/Journal **Yes**
 Journal(s) **Wake Forest Journal of Law & Policy**
 Moot Court Experience **No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

August 22, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a rising third-year student at Wake Forest University School of Law. I write to apply for a clerkship in your Chambers for the 2021-22 judicial term. I have strong writing skills and diverse work experience that I believe will make a meaningful contribution to Chambers.

I discovered an interest in writing as an undergraduate history major at William & Mary, where I had the opportunity to research and write about fascinating topics such as the Navajo code talkers, Castro's revolutionary game of baseball, and sixteenth century Seville's relationship with the New World. As a law student, I have taken several writing-intensive courses, including Judicial Clerking and Appellate Advocacy, and I will also be participating in the Appellate Clinic during my third year. Through this coursework, I have conducted legal research, written briefs, and drafted a bench memo as well as the corresponding opinion in a real appellate case for my Judicial Clerking class. As a result of my written work product, I was selected to serve as a TA for LL.M. students to help develop their legal research and writing skills. Moreover, as a Notes & Comments Editor for the *Wake Forest Journal of Law & Policy*, I will continue to improve my strong editing skills.

I have balanced experience with both federal criminal and civil issues, having worked for a district court judge and the U.S. Attorney's Office. Last summer, I served as a judicial extern for Judge Thomas F. Hogan at the U.S. District Court for the District of Columbia. My time in Judge Hogan's Chambers was a great introduction to the various aspects of clerking. As a judicial extern, I gained insight into effective advocacy by observing several motion hearings, jury trials, and sentencings. Most of my day involved writing bench memos and researching various issues for upcoming hearings. This past semester, I worked twice a week at the U.S. Attorney's Office (MDNC) where I drafted two response briefs filed with the U.S. District Court and the Fourth Circuit Court of Appeals. Among other things, these experiences taught me how to effectively manage my time, work well under pressure, maintain confidentiality, and handle feedback constructively.

I am a self-motivated competitor who is hardworking, dependable, trustworthy, loyal, and helpful. I am a team player and always look for ways to better assist my colleagues. I am meticulous but also approach legal issues creatively, considering all angles of a problem before proposing the best path forward.

Please feel free to contact me should you have any questions or require additional information. I am available to interview at your convenience. Thank you for considering me, and I look forward to hearing from you.

Sincerely,

Patrick J. Crowley

Patrick J. Crowley
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Great Falls, VA 22066
Crowpj18@wfu.edu
703-585-1105

EDUCATION

Wake Forest University School of Law, Winston-Salem, NC

J.D. Candidate, May 2021

GPA: 3.613 Class Rank: Top 18%

- *Wake Forest Journal of Law & Policy* ~ Notes & Comments Editor
- Latino Law Students Association
- Litigation Externship Clinic and Appellate Clinic

William & Mary, Williamsburg, VA

B.A. in History, May 2018

GPA: 3.44

- Minor in Management & Organizational Leadership
- Rugby; Studied abroad in Seville, Spain, 2017

Gonzaga College High School, Washington D.C.

EXPERIENCE

Smithsonian Institution's Office of the General Counsel, Washington D.C.

Legal Intern

June – August 2020

Wake Forest University School of Law, Winston-Salem, NC

Research Assistant for Professor Carol Anderson

May – June 2020

- Edited Professor Anderson's book, providing substantive feedback, citations, and grammatical corrections

Wake Forest University School of Law, Winston-Salem, NC

TA for Legal Analysis, Writing, and Research; TA for Scholarly Writing

August 2019 - Present

- Advised LL.M. students on legal research strategies and Bluebook citations
- Provided students with draft feedback on various legal writing assignments

United States Attorney's Office for the Middle District of North Carolina, Winston-Salem, NC

Extern

January – April 2020

- Wrote two response briefs on behalf of the USAO filed at the U.S. District Court (MDNC) and the Fourth Circuit
- Researched various criminal and civil issues and drafted several memos

United States District Court for the District of Columbia, Washington D.C.

Judicial Extern for the Honorable Thomas F. Hogan

May - August 2019

- Conducted legal research, drafted bench memos, and observed status conferences, motion hearings, and trials

Summer at Madeira, McLean, VA

Logistics Supervisor

June - August 2018

- Organized camp transportation, communicated routes with parents, and managed the bus drivers
- Ran day-to-day logistical operations; scheduled and supervised field trips

William & Mary Student Accessibility Services, Williamsburg, VA

Golf Cart Driver

October 2015 - April 2018

- Worked part-time in college transporting registered students with limited mobility around campus

SKILLS & INTERESTS: Conversational in Spanish; enjoy playing and watching sports; Cuban and Spanish history

Patrick Crowley
Wake Forest University School of Law
Cumulative GPA: 3.613

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure I	Susan Grebeldinger	A-	3	
Contracts I	Timothy Davis	B+	3	
Criminal Law	Gordon Widenhouse	B+	3	
Legl Analysis, Writing & Res I	John Korzen	A-	2	
Professional Development	Francie Scott	S	0	
Torts	Mike Green	A-	4	

Semester GPA: 3.534

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure II	Susan Grebeldinger	A	3	
Constitutional Law I	Michael Kent Curtis	B	3	
Contracts II	Timothy Davis	A-	3	
Legl Analysis, Writing & Res II	John Korzen	A-	2	
Professional Development	Francie Scott	A*	1	
Property	Christopher Knott	A	4	

Semester GPA: 3.690

Summer 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
D.C. Summer Externship (P/F)		P	3	
Judicial Clerking (P/F)	Abigail Perdue	H	3	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Appellate Advocacy LAWR III	Heather Gram	A-	2	
Essential Business Concepts	Chris Meazell	B+	2	
Evidence	Steve Virgil	A-	4	
Journal of Law and Policy		S	0	
Legal Analysis, Writing and Research IV		S	0	
Legislation and Administrative Law	Margaret Taylor	A-	3	
Mass Media Law LAWR IV	Chris Meazell	A-	2	

Semester GPA: 3.617

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Journal of Law and Policy		CR	2	
Litigation Externship Clinic (P/F)	Carol Anderson	CR	6	
Sports Law	Timothy Davis	CR	2	
Trial Practice Lab (P/F)	Matthew Breeding	CR	3	
Trial Practice Lecture		CR	0	

Due to COVID-19, Wake Forest Law implemented a credit/no credit grading system for the semester, and I received credit for all my courses.

Grading System Description

Cumulative Rank: 31/170 (Top 18%)

Julia M. Kiraly
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June 8, 2020

LETTER OF RECOMMENDATION: PATRICK CROWLEY

Dear Honorable Sir/Madam:

I am pleased to offer this letter in enthusiastic support of Patrick Crowley's candidacy for a judicial clerkship. Patrick's professional maturity, intellectual curiosity, and careful consideration will make him an asset to any judicial chambers. Most importantly, though, Patrick is genuine, has a great sense of humor, demonstrates compassion toward others, and has good manners, which make him an enjoyable employee and colleague. In addition to being admirable, these qualities indicate that he will work well in the smaller confines of a judicial chambers, where collegiality is an imperative and graciousness is always welcome.

I was introduced to Patrick when he joined our chambers as a summer judicial intern after his first year of law school. In addition to numerous other projects, he was tasked to work on issues raised in a complex motion for summary judgment that typically would not have been assigned to an inexperienced law student. To analyze the issues, Patrick needed to interpret multiple federal statutes, some of which were fairly technical and arcane, dating back to the Vietnam War era. Patrick tackled the issues in an organized and circumspect manner, spotted the right issues and legal pitfalls, and conscientiously applied the legal standards to the facts. His work product was both useful and well-reasoned, which is not always the case for interns who have just completed their first year of law school. Notably, he sought guidance appropriately and only after first making substantial strides to resolve a question on his own, which the law clerks greatly appreciated. And he welcomed constructive criticism, never got flustered under pressure, and engaged in legal discussions with the right amounts of both aplomb and humility. He was a happy presence in our chambers and we all enjoyed his tenure with us.

It can be difficult to differentiate applicants, nearly all of whom offer impressive academic credentials, community involvement, and letters of recommendation that contain the right superlatives but might not necessarily leave much of an impression about who the candidate really is. My best example of the kind of person Patrick is has not been derived from a demonstration of capable legal analyses or scholarly discussions, although I believe that Patrick can hold his own on both of those fronts based on my observations of him while he served for

LETTER OF RECOMMENDATION: PATRICK CROWLEY (CONT.)

three months as a judicial intern. Rather, what impressed me most about him was revealed during a run-of-the-mill conversation I had with a gentleman who helps maintain our judicial chambers. I was exchanging pleasantries with this gentleman, whom I have gotten to know over the years but whose visits to judicial chambers are sometimes unacknowledged by others. As we chatted, Patrick came out of his office without prompting, introduced himself, shook the gentleman's hand, and joined our conversation. That cemented my view that Patrick is considerate and kind, which will serve him well throughout his career.

I hope that you will give Patrick's candidacy strong consideration. I think you will enjoy working with him in addition to benefitting from the value he can add to your chambers as a law clerk. I welcome you to contact me at any time if you have questions about Patrick's application or would like to discuss his qualifications.

Sincerely,

A handwritten signature in blue ink, appearing to read "Julia M. Kiraly", with a large, stylized flourish extending from the end of the signature.

Julia M. Kiraly



Abigail L. Perdue

Tenured Professor of Legal Analysis, Writing, and Research
Director, D.C. Summer Judicial Externship Program

MOBILE: (571) 205-5529

FAX: (336) 758-4496

perduea@wfu.edu

June 3, 2020

Dear Judge,

I am writing to recommend that you hire Patrick Crowley, a rising third-year law student at Wake Forest University School of Law, as your law clerk. Based on my interaction with Patrick inside and outside the classroom, I believe he will make a valuable asset to your Chambers.

Patrick was chosen to participate in Wake Forest's highly selective D.C. Summer Judicial Externship Program (Program) during the summer of 2019. I am the Founding Director of the Program, and I also teach its accompanying course on judicial clerking. As part of the Program, Patrick externed for a federal judge at the U.S. District Court for the District of Columbia. By all accounts, he performed well.

As part of the Judicial Clerking course accompanying the judicial externship, Patrick drafted a bench memo and opinion in a real case that was pending before the U.S. Court of Appeals for the Federal Circuit. Patrick also read my book—*The All-Inclusive Guide to Judicial Clerking* (WestAcademic 2017). Among other things, he studied chambers confidentiality, clerkship ethics, professionalism, courtroom decorum, judicial technology, and judicial drafting. He also met and mingled with judges, law clerks, prosecutors, and practitioners. Patrick performed exceedingly well in my course, crafting a bench memo and opinion that were far above average. As a result, he earned an Honors Pass for the course, which is the highest grade available. He handled difficult questions well and was always highly engaged. He arrived to class and course events on time and well prepared. He consistently displayed professionalism and enthusiasm. Patrick is a strong writer, analyst, and researcher as demonstrated by his strong performance in Judicial Clerking as well as his very high grades in other writing-intensive classes like Legal Writing I and II (A-) and Appellate Advocacy (A-).

On a personal note, Patrick has a great personality. He is funny, friendly, outgoing, well rounded, sincere, and collegial. He gets along well with peers. He is also very interested in clerking.

For all of these reasons, I recommend that you hire Patrick as your law clerk. Thank you for considering him. Please reach out if you have any questions or require additional information.

Regards,

A handwritten signature in cursive script that reads "Abigail L. Perdue".

Professor Abigail L. Perdue
Wake Forest University School of Law



July 6, 2020

RE: Letter of Recommendation

To Whom it May Concern,

It is with pleasure that I recommend Patrick Crowley for a judicial clerkship. I was Patrick's Appellate Advocacy professor at Wake Forest University School of Law, and I immensely enjoyed having him in my class. He is creative, intelligent, diligent, thorough, and could always be counted on to contribute to our discussions. Patrick's thoughtful questions throughout the semester regarding class assignments not only helped me better explain the issues to other students, they caused me to think about those assignments in a new way. His attention to detail and desire to learn honed and improved his writing in noticeable ways. He gets along well with everyone, respects their viewpoints, and is thoughtful in his actions.

Upon reviewing his resume, you will notice that Patrick has a long history of success, both in and out of the classroom. While his academic record of achievement is impressive, his service to others is also noteworthy. Patrick is particularly adept at assisting others in fine tuning and editing their written work. Through his responsibilities as Notes and Comments Editor at Wake's *Journal of Law & Policy* to his work advising LLM students, Patrick is clear in his intent to bring out the best in others. He is tenacious, curious, and collaborative, and I cannot recommend him highly enough for a clerkship.

If you have any additional questions for me, feel free to call me directly at 336-758-3790 or email me at gramhs@wfu.edu.

Sincerely,

Heather Gram
Visiting Assistant Professor
Wake Forest University School of Law

Patrick J. Crowley

STATE OF NORTH CAROLINA
DUPLIN COUNTY

IN THE COURT OF GENERAL JUSTICE
SUPERIOR COURT DIVISION
19-CVS-0004

DUPLIN DERMATOLOGICAL)
SPECIALISTS, P.A.,)
)
Plaintiff,)
)
vs.)
)
HELENA ROURKE,)
)
Defendant.)
_____)

**BRIEF IN OPPOSITION TO MOTION
FOR PRELIMINARY INJUNCTION**

PRELIMINARY STATEMENT

Defendant Dr. Helena Rourke submits this brief in response to the motion for a preliminary injunction filed by Plaintiff Duplin Dermatology Specialists, P.A. (“DDS”). As part of the DDS employment contract, Dr. Rourke signed a covenant not to compete (“CNC”) with a three-year, seven-county scope. After terminating her DDS employment, Dr. Rourke opened a practice within the CNC parameters. DDS brings this motion to enjoin Dr. Rourke from practicing dermatology in a very rural area that is in considerable need of Dr. Rourke’s unique services. Because DDS has failed to establish a likelihood of success on the merits, Dr. Rourke respectfully requests that this Court deny the motion for a preliminary injunction.

STATEMENT OF FACTS

Married Doctors Roger and Martha Smiley (“the Smileys”) jointly own and manage DDS in Duplin County, North Carolina. The CNC that Dr. Rourke signed in the DDS employment contract prohibited her from practicing dermatology for

Patrick J. Crowley

three years after termination in the counties of Duplin, Jones, Lenoir, Onslow, Pender, Sampson, and Wayne. 83% of DDS patients reside in Duplin County with the remaining 17% scattered among the other restricted counties. The majority of patients who reside outside of Duplin County live in Sampson County. If the CNC is enforced, Dr. Rourke will be at least two hours roundtrip from most of her patients.

After losing her grandfather to skin cancer, Dr. Rourke decided to practice dermatology with the goal of helping her home community of Duplin County. She hoped to open a technologically advanced practice that provided monthly charitable skin cancer detection clinics. To pursue these aspirations, Dr. Rourke terminated her employment with DDS in August 2018 and opened her own practice in Duplin County on January 2, 2019. Her decision to leave mainly pertained to the Smileys' refusal to purchase new medical technology coupled with their adamant rejection of Dr. Rourke's idea to use the DDS building on weekends to host charitable clinics.

Dr. Rourke is fluent in Spanish, and Duplin County's population is over 20% Latino. Affidavits state there is a local shortage of Spanish-speaking doctors, and that Dr. Rourke is both willing and capable of treating patients who only speak Spanish. Among the Latino population, skin cancer has been an increasing problem. Portions of both the local Hispanic and general populace go without medical care as many lack health insurance or adequate funds. Dr. Hill, who plans to retire at the end of 2020, is the only DDS alternative for residents in the area, and appointments are hard to get. Dr. Hill only refers patients to Dr. Rourke and stated in an affidavit that Duplin County would benefit from Dr. Rourke's continued practice, especially

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“due to the client population” she wants to serve “and the newer technology she would introduce.”

QUESTIONS PRESENTED

- I. Under North Carolina law, is the three-year, seven-county restriction reasonable as to time and territory in the DDS covenant not to compete?
- II. Under North Carolina law, does enforcing the covenant contravene public policy, when it would create a local monopoly and deprive patients of a charitable clinic, new medical technology, and a physician fluent in Spanish?

ARGUMENT

The Court should deny the motion for a preliminary injunction because DDS is not likely to succeed on the merits. A court may issue a preliminary injunction only when the plaintiff establishes both a favorable likelihood of success on the merits and the irreparable harm that would subsequently occur if the injunction is denied. *Iredell Digestive Disease Clinic P.A. v. Petrozza*, 373 S.E.2d 449, 451 (N.C. Ct. App. 1988). While Dr. Rourke admits that DDS can meet the irreparable harm requirement, DDS cannot establish a likelihood of success on the merits because the CNC is not enforceable. The plaintiff can establish a likelihood of success on the merits only if the CNC is enforceable. A CNC between medical professionals is enforceable when it is: “(1) in writing, (2) entered into at the time and as part of the contract of employment, (3) based upon reasonable consideration, (4) reasonable both as to time and territory, and (5) not against public policy.” *Id.* at 452. While Dr. Rourke does not challenge the first three elements, the last two elements are not

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met. First, the combined time and territory restriction is unreasonable because three years is far too long of a period for this broad geographical scope. Second, the CNC between DDS and Dr. Rourke directly contravenes public policy because it creates a substantial risk of harm to the public health.

I. The time and territory restriction is unreasonable because three years is too long for this broad geographical range.

The time and territory of this CNC is unreasonably restrictive because the seven counties extend far beyond what is necessary to protect DDS, and three years is too long to counter this imbalance. Time and territory must be considered “in tandem” so that the “combined effect” of the two is reasonable. *Okuma Am. Corp. v. Bowers*, 638 S.E.2d 617, 620 (N.C. Ct. App. 2007). The geographical limit cannot extend past what is “necessary to protect the employer's reasonable business interests.” *Id.* To determine what geographical limits are reasonable, the party seeking to enforce the CNC must show where its customers reside and why the entire restricted territory is necessary to protect that market. *Id.* If the restricted territory extends more than necessary, the time and territory element is too broad, and the CNC cannot be enforced. *Horner Intern. Co. v. McKoy*, 754 S.E.2d 852, 856 (N.C. Ct. App. 2014). Courts cannot rewrite the geographical terms to make them reasonable; the contract will just be ruled unenforceable. *Id.* However, if the time period is short, the reasonableness of the territory can be farther extended and vice versa. *Kennedy v. Kennedy*, 584 S.E.2d 328, 334 (N.C. Ct. App. 2003).

In *Kennedy*, the time and territory restriction within the CNC prevented a dentist from practicing within a fifteen-mile radius of the plaintiff's dental office for

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three years. *Id.* at 333. The court held that the time and territory element was reasonable because the longer three-year time period was balanced out by the very small fifteen-mile restricted radius. *Id.* at 334; *see also Petrozza*, 373 S.E.2d at 450 (holding that a physician CNC covering a similarly small twenty-mile radius of a city for three years had a reasonable time and territory); *Statesville Med. Grp. v. Dickey*, 418 S.E.2d 256, 257 (N.C. Ct. App. 1992) (holding that a physician CNC covering only one county for just two years had a reasonable time and territory).

Here, the CNC prohibits Dr. Rourke from practicing dermatology for three years in seven counties. The seven-county restriction is far larger in scope than the fifteen miles in *Kennedy*, the twenty miles in *Petrozza*, and the one county in *Dickey*. Among the three cases, *Dickey* had the largest territory of one county, but it also had the shortest time period of two years. On the other hand, *Kennedy* and *Petrozza* had much smaller territorial boundaries but had a longer three-year time period. Using *Kennedy*, *Petrozza*, and *Dickey* as a comparative measure, the DDS agreement would be unreasonable because the three-year length would require a much smaller geographical area than seven counties to be reasonable.

DDS has directed the Court to certain authority, like the cases cited in *Kennedy*, that involve covenants with longer time periods and broader territories; however, these cases do not involve physicians. 584 S.E.2d at 334; *see Bicycle Transit Auth., Inc. v. Bell*, 333 S.E.2d 299, 303-04 (N.C. 1985) (holding a CNC, involving competing bike stores, was reasonable in restricting two counties for seven years); *Precision Walls, Inc. v. Servie*, 568 S.E.2d 267, 273 (N.C. Ct. App.

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2002) (holding a CNC, involving a manager in a multi-state corporation, was reasonable in restricting two states for one year). Restricting a physician from medical practice is completely different from restricting a bike store or corporate manager for policy reasons that ultimately result in physician covenants uniformly having shorter time periods and smaller territories. When a risk of harm to the public health is involved, the interests of the public generally outweigh a citizen's contractual rights. *Petrozza*, 373 S.E.2d at 453. To avoid drafting an unenforceable CNC, contracting medical parties are encouraged to construct far more conservative restrictions. Therefore, when considering time and territory, one physician CNC should only be compared in reasonableness to other physician covenants.

In the DDS CNC, the entire restricted territory is not necessary to protect the Smileys' patient market, which makes the seven-county territory unreasonable. The Smileys calculated that 83% of DDS patients reside in Duplin County and the other 17% in an adjoining county, with the majority of the 17% living in Sampson County. Because patients in Sampson County represent a majority of the 17%, the counties of Jones, Lenoir, Onslow, Pender, and Wayne would all have small individual patient populations that likely bear little to no effect on the DDS market. The patient population density suggests that for DDS to protect its business interests, the Smileys should only have included Duplin and Sampson County in the CNC. The territory is thus overly broad because the five additional counties are not necessary to reasonably protect DDS. Even though Dr. Rourke opened her practice in Duplin County, an area the Smileys have a legitimate interest in protecting, the

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court cannot rewrite the terms to make them reasonable by simply narrowing the scope to only Duplin and Sampson County. Therefore, the CNC is wholly unreasonable because it includes five unnecessary counties and a three-year time period that is far too long to balance out the overly broad territory.

DDS argues that even though the DDS patient percentage is small in five counties, Dr. Rourke's ability to open a practice in one of them would place her closer to Duplin and Sampson County, thus allowing her to attract a portion of her former patients. However, there remains significant doubt that all seven counties are needed, and if just one county is considered unreasonable, that is enough to make the entire CNC unenforceable. DDS had the burden of providing the patient distribution by county to the Court and should have referred to such data in its reasonableness argument regarding each county's financial importance. Yet, the Smileys did not attempt to calculate or even provide estimates of its patient percentages in six of the seven counties when that information was on file and easily accessible. Therefore, significant doubt exists as to why the counties of Jones, Lenoir, Onslow, Pender, and Wayne are each necessary to protect DDS when DDS cannot provide the requisite data needed to make an informed judgment. In sum, DDS has failed to establish a favorable likelihood of success for time and territory.

II. The CNC is against public policy because enforcement would create a substantial risk of harm to the public health.

The CNC is against public policy because DDS would have a monopoly for at least seven months, and the public would be deprived of charitable skin cancer screenings, a bilingual doctor, and new medical technology. A CNC between

Patrick J. Crowley

physicians is unenforceable as against public policy when its enforcement “would create a substantial question of potential harm to the public health.” *Petrozza*, 373 S.E.2d at 453. The following factors are indicators of a potential risk of harm to the public health: a shortage of specialists, the impact of a “specialist” monopoly, and the patient’s interest in choosing the most suitable physician. *Dickey*, 418 S.E.2d at 259. If enforcement would only create an inconvenience to the public health rather than a substantial risk of harm, the contract may be enforced. *Petrozza*, 373 S.E.2d at 453.

A CNC is unenforceable on policy grounds when enforcement would reduce the area to one specialist because it would create a substantial risk of harm to the public health. *Petrozza*, 373 S.E.2d at 454-55; *Dickey*, 418 S.E.2d at 260. The court in *Petrozza* reasoned that the impact of a local monopoly would place the public health at risk because it could result in fee increases, limit patient accessibility to a gastroenterologist, especially in life-threatening situations, and force residents to drive forty miles to see another specialist. The court was also reluctant to deprive the public of its ability to choose a physician. 373 S.E.2d at 453, 455. In *Dickey*, the court reasoned that the impact of a local two-year monopoly would place the public health at risk because it could limit patient accessibility to an endocrinologist, risk the availability of an endocrinologist in times of emergency, eliminate fee competition, make a second opinion difficult to obtain, and impede on the patient’s right to choose a physician. 418 S.E.2d at 259.

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Here, the DDS CNC, like the covenants in *Petrozza* and *Dickey*, is against public policy and would create a monopoly, which in this case would last for at least seven months. Excluding the Smileys, Dr. Hill is the only other dermatologist in Duplin County, and he plans to retire at the end of 2020. Dr. Rourke terminated her employment with DDS in August 2018, starting the three-year time period of the CNC. Thus, after Dr. Hill's retirement, DDS would be the sole dermatological practice in Duplin County for at least seven months into 2021 until Dr. Rourke would once again be eligible to practice in the area. The Court should consider that enforcing the CNC would compel Dr. Rourke to leave the greater Duplin County area if she wished to continue practicing medicine, with no guarantee of her return.

If Dr. Rourke is forced to relocate, DDS will probably maintain exclusive control of the patient market for far longer than seven months. As the sole local practice, DDS could raise patient fees without risk of losing patients to a lower-priced competitor. Dr. Rourke would be at least two hours roundtrip from most of her current patients, so granting the injunction would force patients to choose between a very long and expensive commute to see Dr. Rourke or switching over to one of the Smileys. Unlike the medical fields in *Petrozza* and *Dickey* that can at times involve on-call emergency treatment, dermatology practice typically does not include such scenarios. However, excessive appointment delay due to a booked-up schedule can lead to serious public health concerns. Skin cancer is a growing problem in Duplin County, a largely agricultural area. Appointment delay can affect

Patrick J. Crowley

at which stage the cancer is diagnosed. When it is not diagnosed and treated in a timely manner at an early stage, the cancer will spread and can result in death.

While the monopolies in *Petrozza* and *Dickey* only involved one remaining specialist in the area, DDS will have two; however, there are warranted concerns with the Smileys' capacity and ability to treat all the patients seeking treatment in a timely fashion. After Dr. Hill's retirement, the Smileys will likely have to take on most of his former patients. It seems far-fetched that the Smileys will be able to care for all of their current patients, and both Dr. Hill's and Dr. Rourke's former patients within a reasonable time period. Additionally, the Smileys' marriage places limitations on their capacity to treat patients that two unassociated dermatologists in separate practices would not face. The Smileys likely work the same hours and vacation together, which creates less appointment flexibility and availability for patients. The Smileys' marriage would also put patients in an uncomfortable position if they are unhappy with their current dermatologist and wish to switch; moreover, a patient dismissal by one of the Smileys would mean dismissal from DDS, isolating the patient from alternative dermatological care.

Dr. Rourke's continued practice would immensely benefit the community in ways the Smileys cannot. Her Spanish fluency allows her to effectively treat Spanish-speaking residents. Dr. Rourke has expressed her intention to open monthly charitable skin cancer clinics that would aid residents that cannot afford health care. In addition, Dr. Rourke plans to incorporate new medical technology into her practice that will result in more accurate diagnoses. Both the Smileys and

Patrick J. Crowley

Dr. Hill cannot speak Spanish and have no interest in new medical technology. Additionally, there is no indication that they intend to provide free clinics. So even if DDS was able to sufficiently support most paying patients, enforcing the CNC would still create a substantial risk of harm to a portion of the public health. Those who are unable to afford medical treatment, residents who only speak Spanish, and anyone who would have received a more favorable medical outcome had newer technology been utilized, are all members of the public at risk for skin cancer.

Dr. Rourke's forced relocation would surely be far more than a mere inconvenience to these patient groups listed above; it could even prove fatal. DDS cites *Kennedy*, where the court reasoned that because the restricted area contained several other dental practices, there was no real threat to the public health, just an inconvenience to patients. 584 S.E.2d at 335. Here, even though DDS consists of two married dermatologists, Duplin County will still only have one practice; whereas, the restricted area in *Kennedy* had several other dental practices. Moreover, the Court should consider that a situation involving delayed or no skin cancer screenings is a far more serious dilemma than just having to switch dentists.

CONCLUSION

Because the covenant not to compete is unenforceable, DDS cannot establish a likelihood of success on the merits. Accordingly, Dr. Rourke petitions this Court to deny the preliminary injunction motion.

Applicant Details

First Name **Quinlan**
 Middle Initial **A**
 Last Name **Cummings**
 Citizenship Status **U. S. Citizen**
 Email gac2@georgetown.edu
 Address
 Address

Address**Street****77 H Street NW, Apartment 273****City****Washington****State/Territory****District of Columbia****Zip****20001****Country****United States**

Contact
 Phone Number **6097124650**

Applicant Education

BA/BS From **Georgetown University**
 Date of BA/BS **May 2019**
 JD/LLB From **Georgetown University Law Center**
https://www.nalplawschools.org/employer_profile?FormID=961
 Date of JD/LLB **May 18, 2022**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **American Criminal Law Review**
 Moot Court Experience **No**

Bar Admission

Prior Judicial Experience

Judicial
Internships/ **Yes**
Externships
Post-graduate
Judicial Law **No**
Clerk

Specialized Work Experience

Professional Organization

Organizations **Summer intern with the National Football League
(2020); Incoming Summer Associate at Winston &
Strawn LLP (2021)**

Recommenders

Ross, Susan
ross@law.georgetown.edu
Han, Eun Hee
eh79@georgetown.edu
Spann, Girardeau
spann@law.georgetown.edu
202-662-9103

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

QUINLAN CUMMINGS

77 H Street NW, Apartment 273, Washington, DC 20001 | Phone: (609) 712-4650 | E-Mail: qac2@georgetown.edu

The Honorable Judge Elizabeth Hanes
U.S. District Court for the Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Honorable Judge Hanes:

I am a rising third-year student at Georgetown University Law Center and I am writing to apply for a clerkship beginning in 2022. I have loved my experience working for the Honorable Judge Schwartz on the Third Circuit, and I find that the pace and subject matter of federal litigation present the most interesting legal questions to engage with. I would value the opportunity serve in your chambers.

As a former college athlete, I am comfortable both working independently and with a team, which will allow me to quickly adapt to your chambers and contribute meaningfully to your work. As a judicial intern for Judge Schwartz, I had to quickly produce quality research and writing on legal issues that were novel to me. If selected as a clerk in your chambers, I will exhibit this same ability to effectively and independently balance responsibilities while working on dynamic legal issues.

I appreciate your consideration for this clerkship. I have enclosed my resume, transcript, and writing sample for your review. Also enclosed are letters of recommendation from Professors Eun Hee Han, Susan Deller Ross, and Girardeau Spann. Judge Schwartz as a policy does not offer letters of recommendation. However, she has offered to serve as a reference for my candidacy and may be contacted by phone at (973)-645-6596 or by email at Chambers_of_Judge_Patty_Schwartz@ca3.uscourts.gov. I understand that acceptance into your chambers is very competitive, and I am available at any time to provide any further information regarding my candidacy at qac2@georgetown.edu or via phone at 609-712-4650. Thank you very much for your time.

Sincerely,



Quinlan Cummings

QUINLAN A. CUMMINGS

77 H Street NW, Apartment 273, Washington, DC 20001 • (609) 712-4650 • qac2@georgetown.edu

EDUCATION

Georgetown University Law Center

Washington, DC

Juris Doctor

Expected May 2022

GPA: 3.69

Journal: *American Criminal Law Review*, Managing Editor

Honors: Dean's List 2019

Activities: Women's Legal Alliance, Vice President and Professional Development Co-Chair

Georgetown University

Washington, DC

Bachelor of Arts, cum laude, in Women and Gender Studies

May 2019

GPA: 3.75

Honors: Dean's List High Honors every semester; senior thesis awarded distinction; Georgetown Rowing Legacy Award (recognizing one outstanding senior for character and athletic achievement).

EXPERIENCE

Winston & Strawn LLP

New York, NY

Incoming Summer Associate

Summer 2021

United States Court of Appeals for the Third Circuit

Newark, NJ

Legal Intern for the Honorable Judge Shwartz

December 2020-January 2021

- Researched pending cases, case dockets, and rehearing petitions. Prepared case summaries with recommendations regarding what action Judge Shwartz should take.
- Researched relevant case law and substantively edited opinions and orders for Judge Shwartz.

Women's International Human Rights Clinic

Washington, DC

Student Attorney

August 2020-December 2020

- One of eight students selected to assist a human rights legal advocacy organization in international human rights litigation in Lesotho.
- Co-authored a seventy page brief to be submitted to the Labour Court, arguing for an expansive interpretation of sexual harassment and employer liability within the Lesotho Labour Code.
- Drafted memos twice weekly on potential case arguments and led monthly meetings on case strategy with our partner organization.

National Football League

New York, NY

Legal Intern

July 2020-August 2020

- Conducted legal research on anti-corruption, ethics and gift laws, sports betting, and employment matters. Presented research to VP of Compliance to assist in determining official League policy.
- Assisted in researching, drafting, and editing the 2021 NFL Compliance Plan for all staff and players.
- Designed internal compliance training programs and drafted guidance documents for staff and players.
- Researched compliance conflict-of-interest cases. Prepared questions for follow-up interviews for these cases.

Mother's Outreach Network

Washington, DC

Legal Intern

September 2019-August 2020

- Researched the legal and political history of DC statehood; produced legal curriculum, case law manuals, and other resources on the subject.
- Presented research on DC statehood in meetings with donors to gain funding for the project.

INTERESTS & PUBLICATIONS

- Interests: Marathon running, coaching rowing, hiking, reading (particularly biographies/ autobiographies).
- Publications: *Three Venues, Two Jurisdictions, and One Settlement: Updates from the Southern District of New York in FaZe Clan, Inc. v. Tenney*, Skadden Esports and the Law, Fall 2020, at 8.

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Quinlan Ames Cummings
GUID: 843761294

Course Level: Juris Doctor

Degrees Awarded:
 Bachelor of Arts May 18, 2019
 Georgetown College
 Major: Women's and Gender Studies
 Honors: Cum Laude

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	001	91	Civil Procedure	4.00	B+	13.32	
			Charles Abernathy				
LAWJ	004	13	Constitutional Law I: The Federal System	3.00	B+	9.99	
			Susan Bloch				
LAWJ	005	12	Legal Practice: Writing and Analysis	2.00	IP	0.00	
			EunHee Han				
LAWJ	008	91	Torts	4.00	A-	14.68	
			Girardeau Spann				
Dean's List Fall 2019							

	EHrs	QHrs	QPts	GPA
Current	11.00	11.00	37.99	3.45
Cumulative	11.00	11.00	37.99	3.45

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
			Spring 2020				
LAWJ	002	12	Contracts	4.00	P	0.00	
			Michael Diamond				
LAWJ	003	91	Criminal Justice	4.00	P	0.00	
			Paul Butler				
LAWJ	005	12	Legal Practice: Writing and Analysis	4.00	P	0.00	
			EunHee Han				
LAWJ	007	91	Property	4.00	P	0.00	
			Michael Gottesman				
LAWJ	1326	50	Legislation and Regulation	3.00	P	0.00	
			William Buzbee				
LAWJ	611	20	Advocacy, Client Counseling and Negotiation Skills in Practice Settings	1.00	P	0.00	

Sheldon Krantz
Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	20.00	0.00	0.00	0.00
Annual	29.00	11.00	37.99	3.45
Cumulative	31.00	11.00	37.99	3.45

-----Continued on Next Column-----

Subj	Crs	Sec	Title			Crd	Grd	Pts	R
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----- Fall 2020 -----					
LAWJ	121	07	Corporations	4.00	A- 14.68

LAWJ	230	08	Charles Davidow International and Comparative Law on Women's Human Rights	2.00	A	8.00
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Susan Ross
LAWJ 520 05 International Women's Human Rights Clinic NG

LAWJ	520	81	~Clinic Litigation/ Legislation	4.00	A-	14.68
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Susan Ross						
LAWJ	520	82	~Clinic Seminar	4.00	B+	13.32

LAWJ	520	83	~Professionalism & Procedure	2.00	B+	6.66
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Susan Ross

	EHrs	QHrs	QPts	GPA
Current	16.00	16.00	57.34	3.58
Cumulative	47.00	27.00	95.33	3.53

Subj	Crs	Sec	Title		Crd	Grd	Pts	R
----- Spring 2021 -----								

LAWJ	1482	09	Negotiations and Mediation Seminar	3.00	A+	12.99
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LAWJ	165	07	Evidence	4.00	A	16.00
LAWJ	1738	05	Supreme Court Today	2.00	B+	6.66

LAWJ	1738	05	Supreme Court Today	2.00	B+	0.00
LAWJ	215	05	Constitutional Law II:	4.00	A	16.00

LAWJ	361	05	Individual Rights and Liberties	2.00	A	8.00
			Professional Responsibility			

----- Transcript Totals -----

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	59.65	3.98
Annual	31.00	31.00	116.99	3.77
Cumulative	62.00	42.00	154.98	3.69

----- End of Juris Doctor Record -----

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 07, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to recommend with great enthusiasm Ms. Quinn Cummings to be your judicial law clerk. She is a very talented law student whom I had in two courses last semester. One course was a 2-credit exam course and the other a 10-credit clinical course. She stood out in both classes, where she was a frequent contributor to class discussions and did excellent work. Indeed, her exam score was the second-highest in the class. She is also the Managing Editor of the American Criminal Law Review. On a personal level, she is friendly and engaging.

For her work in the International Women's Human Rights Clinic, which requires students to write a compelling test-case brief, she made great progress during the semester and wrote an excellent brief. It was a difficult project for a second-year student in her first semester to undertake. The Clinic works with NGO partners in other countries to develop test-case litigation papers that they can file in domestic courts, or if they lose domestically, before regional or international human rights treaty bodies. Our Lesotho partner wanted to address a Lesotho law concerning sexual harassment that had been very narrowly interpreted. So Quinn's project with another student was to develop test-case papers using both Lesotho law, comparative sexual harassment law from other countries, and relevant human rights treaty obligations. It required an in-depth understanding of many different sources of law, none of which she had studied before.

After first studying the relevant law in great depth, the students wrote three complete drafts of the papers, revising and editing each draft after receiving comments from faculty, other students, and our partner. Quinn did an excellent job of learning and understanding all the new law she needed to know. She did need help in writing persuasive arguments, but she was eager to improve, and willing to put in the hours to make it happen. By the end, she wrote persuasive arguments on a very difficult subject and deserved her A- grade. As she recently reported in an open-house we held with students considering taking the Clinic next year, she received plaudits for her writing when she interned for a U.S. Court of Appeal judge during the December 2020-January 2021 period after the Clinic – something she attributed to what she had learned in the Clinic.

I admire Quinn for her willingness to work as hard as necessary to be an excellent lawyer. She has demonstrated this quality in overcoming other serious difficulties. As she wrote in applying to Georgetown Law, her mother died suddenly during her freshman year at college. She wrote very movingly about how the pain she endured in her daily 5 a.m. rowing team practice sessions helped her overcome the emotional pain of losing her mother. She felt alive during those sessions and it helped her move on through her daily life during the next four years. She even became a NCAA D1 rower on a nationally ranked team, something no one would have predicted from her high school sports career. Today, she remains very involved with sports and even interned with the National Football League last summer.

In short, Quinn has the talent and dedication to be an excellent judicial law clerk. I recommend her whole-heartedly for this position with you.

Sincerely yours,

Susan Deller Ross

Susan Ross - ross@law.georgetown.edu

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600 New Jersey Avenue, NW
Washington, DC 20001

June 07, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing in wholehearted support of Quinlan Cummings's application for a clerkship in your chambers. Quinn is a bright, thoughtful, and dedicated student who took my full-year Legal Practice course, a course in legal research, analysis, and writing, as a first-year student at Georgetown University Law Center.

Quinn was one of the most engaged students in my class. What truly set Quinn apart as a student in my course was her intense attention to detail and dedication to understanding all aspects of the analysis of a given issue. Quinn was a rower in college and she brought a rower's focus to my course. She approached legal issues with care and thoughtfulness, addressing all avenues of analysis and exhaustively researching and reviewing applicable sources. Quinn even brought the same care and attention to detail to her source citations, meticulously completing citation exercises even beyond those assigned in class. Her written work thus showed her ability to think through all aspects of a given issue, complete thorough research, and clearly and meticulously communicate that research and analysis. During class sessions, Quinn showed her level of focus by asking insightful questions, including the kinds of detailed questions her classmates were hesitant to ask. I believe Quinn would bring the same focus to any task assigned her as a law clerk.

Quinn was also a courteous, collegial, and dedicated student who was rewarding to work with. She had a strong rapport with colleagues when engaging in collaborative work, both offering her own contributions during group exercises and actively listening to and incorporating others' suggestions. Quinn shared with me that she struggled with imposter syndrome at the beginning of law school, and given that struggle, I was so impressed that she so consistently sought to advance her writing skills in one-on-one meetings with me. Quinn repeatedly asked for more feedback, approached feedback with a positive attitude, reflected on that feedback, and then consistently implemented the feedback on subsequent work. Quinn's dedication allowed her to make some of the strongest writing improvements amongst her peers; she is an excellent writer.

Quinn is an intellectually gifted and dedicated individual, and I recommend her without reservation. If I can be of any other assistance, please feel free to contact me at eh79@law.georgetown.edu or 202-316-2085.

Sincerely,

Eun Hee Han
Associate Professor of Law, Legal Practice
Georgetown University Law Center

Eun Hee Han - eh79@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 07, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing at the request of Quinlan Cummings, in support of her application for a judicial clerkship with you. Quinn was a student in my Fall 2019 first-year Torts course, and also in my Spring 2021 upper-class Constitutional Law II course. Based on my impression of her from those courses, I am able to recommend Quinn to you highly for a clerkship position.

Quinn received a grade of A- in my first-year Torts course, which placed her in the top 24% of the 101 students in that class. Quinn received an even higher grade of A in my upper-class Constitutional Law II course, which placed her in the top 20% of the 125 students in that class. (Please note that during the Spring semester of 2020—the second semester of Quinn's first year in law school—all Georgetown Law courses were graded on a mandatory pass/fail basis due to the Covid-19 pandemic. That explains why Quinn's transcript shows no letter grades for that semester. The mandatory pass/fail decision was made by the Law School itself, and not by individual students. The decision was made in an effort to avoid disadvantaging students whose health, economic, technology, or living conditions were not conducive to extended online learning.)

Quinn not only performed well on my Torts and Constitutional Law II exams, but she often made cogent and perceptive arguments in class discussions. In addition, she frequently asked me good questions and engaged in interesting dialogs with me during my office hours. Quinn's roles serving as the managing editor of the Georgetown American Criminal Law Review and as a legal intern for Third Circuit Judge Patty Schwartz, should also give her writing and litigation experiences that would be useful in a judicial clerkship context. Quinn's clinic experience focusing on sexual harassment in southern Africa, and her formative experiences focusing on athletic gender equality in the United States suggest that she will be sensitive to perspectives that are sometimes underrepresented in the United States legal process. Quinn's writing sample—written to comply with the conventions of a foreign court—shows that she is also able to write clearly, and in a well-organized manner. In addition, Quinn has a personality that should make her easy to work with in a judicial clerkship capacity.

In light of her performance in my classes, and her pertinent experiences, I am able to recommend Quinn to you highly for a judicial clerkship. If you would like to discuss Quinn's legal abilities in any greater detail, I encourage you to contact me.

Yours truly,

Girardeau Spann

Girardeau Spann - spann@law.georgetown.edu - 202-662-9103

Quinlan Cummings
917 Lawrenceville Road
Princeton, NJ 08540

The following writing sample is excerpted from the final brief that I submitted in December 2020 for my International Women’s Human Rights Clinic. It is written by me, with several rounds of feedback by my clinic supervisor incorporated into the writing. The fact pattern is hypothetical and involves a young Lesotho woman who worked as a member of the cleaning staff at a local mine and was sexually harassed consistently during her employment period by her manager. She is bringing a case against the mining company for her manager’s actions.

The brief was written to be used by a partner human rights organization in Lesotho; the hypothetical facts are based off research and client interviews regarding workplace harassment in Lesotho so that the partner organization may apply the legal arguments and structure of this brief to future cases that they will litigate. The names used in the brief, “Mr. Y.Z.,” “Ms. A.B.,” and “Mining Company,” are pseudonyms. The formatting of this brief is typical for briefs submitted within the Lesotho court system.

A. Mining Company is Liable for the Harassment that Mr. Y.Z. Committed with Authority He Held as Its Agent Because It Failed to Protect Ms. A.B.

9.1 Mining Company is liable for Mr. Y.Z.’s relentless sexual harassment of Ms. A.B.

because he was acting as its agent in a position of authority. For six months, Ms. A.B. suffered constant harassment in the form of lewd comments, groping, quid pro quos for sex, and more. Her experience was not unique- Mining Company’s perverse culture of harassment has long impacted women workers. No workplace oversight existed to prevent flagrant sexual harassment and none of the women whom Ms. A.B. had turned to for help had ever seen a harassment policy or knew to whom they should report such harassment. Ms. A.B. suffered almost daily for six months at the hands of her supervisor, who abused his position because Mining Company failed to implement proper oversight or offer support to victimized employees. (1) Jurisprudence from the United States on employer liability for harassment provides the most appropriate standard for this Court to follow. With the U.S. as a guiding standard, Mining Company should be held (2) liable for the quid pro quo harassment that Ms. A.B. suffered and (3) liable for failing to take reasonable steps to protect employees, like Ms. A.B., who could not avoid the harm, from hostile work environment harassment.

1. The United States *Faragher/ Ellerth* Standard on Employer Liability is the Most Appropriate Comparative Liability Standard for this Court to Adopt.

9.2 It is appropriate to look to U.S. jurisprudence on employment liability because, as the vanguard of sexual harassment law, the United States' legal standards have been adopted worldwide. *See, e.g.,* Beverley H. Earle & Gerald A. Madek, *An International Perspective on Sexual Harassment Law*, 12 Law & Ineq. 43, 70-72, 88-91 (2017) (“[S]exual harassment regulations developed in the United States and subsequent case law clearly influenced legal developments in other countries,” including the European Community, Canada, and Australia.). Moreover, like U.S. Title VII, the Labour Code lacks clear statutory guidance on employment liability in workplace harassment cases. The U.S. Supreme Court, the country's highest court which produces decisions binding on all states, has addressed this question of employer liability based in Title VII. U.S. jurisprudence can help answer the same question of ambiguity in the Labour Code regarding employer liability for workplace harassment.

9.2.1 The U.S. Supreme Court created the *Faragher/Ellerth* standard when presented with the question of employer liability for harassment cases brought under Title VII, which prohibits employment discrimination. An employer is subject to vicarious liability, meaning that the employer is liable for the wrongful actions of its employee, if a supervisor acting under its authority commits harassment in the workplace. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 776 (1998) (citing 42 U.S.C. sec. 2000e-2(a)(1) (2018)); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 743 (1998); *see also* EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC-CVG-1999-2 (U.S.) (1999).¹ In cases of quid pro quo harassment, the employer is held strictly liable, meaning that it is automatically liable for the harassment committed by its supervisor. *See Ellerth*, 524 U.S. at 760-61. Strict liability is appropriate in cases of quid pro quo harassment because such harassment involves tangible employment actions, which are actions that create “a significant change in employment” such as altering salary or hiring or firing of employees. *Faragher*, 524 U.S. at 790. Because a supervisor cannot commit a tangible employment action without

¹ U.S. Equal Emp. Opportunity Comm'n, EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC-CVG-1999-2 (1999), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors>.

the power given to them as an agent by the employer, the employer is automatically liable when its supervisor commits quid pro quo harassment. *See Ellerth*, 524 U.S. at 743-44, 761-62. In contrast, an affirmative defence to liability is available for the employer when it faces hostile work environment harassment claims because no tangible employment actions were involved. The employer has the burden to prove that it took reasonable steps to prevent workplace harassment *and* that the victim unreasonably failed to use the effective harassment procedures provided by the employer, such as failing to report the harassment through available means. *See Faragher*, 524 U.S. at 778-79. The affirmative defence is intended to incentivize preventative efforts by an employer that uphold the purpose of Title VII to create a safe workplace.

- 9.2.2 The *Faragher/ Ellerth* liability standard which the U.S. Supreme Court read into Title VII is appropriate in this case because of the Labour Code's ambiguity on employer liability for workplace harassment cases. Although South Africa has influenced Lesotho employment law, Lesotho clearly diverges from South Africa on employer liability. The Employment Equity Act requires an employee to immediately report experiences of harassment and an employer who is given notice to "take the necessary steps to eliminate the alleged conduct," while the Labour Code makes no mention of employer liability. Employment Equity Act 55 of 1998 (S. Afr.) sec. 60. Given the close parallels between the Lesotho Codes of Good Practice and the South African 1998 Code, if the drafters of the Labour Code had intended to follow South African precedent on employment liability, they would have done so as they had with the Codes of Good Practice. The lack of statutory guidance within the Labour Code on employer liability is more similar to Title VII, which was settled by the Supreme Court under the *Faragher/ Ellerth* standard. Applying that standard here, Mining Company is strictly liable for the quid pro quo harassment committed by its agent, Mr. Y.Z. It is also liable for the hostile work environment harassment that Mr. Y.Z. committed because it fails to establish the available affirmative defence.
2. Mining Company is Liable for the Quid Pro Quo Harassment that Mr. Y.Z. Committed Using Power He was Given as an Agent of the Company.

9.3 Ms. A.B. suffered persistent, coercive employment threats and promises for sexual favours at the hands of an agent of Mining Company. Mining Company must be held strictly liable, meaning there is no affirmative defence available to it, for the quid pro quo harassment that Mr. Y.Z. committed with its authority. Section 200 and the definition of the term employer in the Labour Code demonstrate that the drafters intended to hold employers liable for the unfair labour practices committed by its agents. The Labour Court routinely recognizes employer liability for the unfair labour practices committed by its agents. *See, e.g., Bulane v New Star Supermarket Ltd.* (LC/04/2015) [2015] LSLC 43 (07 Sept. 2015), para. 23; *Labour Commissioner v Lesotho Carton (Pty) Ltd.* (LC/64/04) [2005] LSLC 5 (21 July 2005), *15-16. Mr. Y.Z.’s quid pro quo harassment would not have been possible if he were not an agent of Mining Company, and thus Mining Company is strictly liable for his actions.

9.3.1 Although workplace harassment committed by an agent typically does not fall within the scope of employment, the U.S. Supreme Court held that an employer may be liable for such harassment because the appropriate standard of liability balances common law agency principles with Title VII’s purpose of creating a safe workplace. *See Meritor*, 477 U.S. at 71-72; *Faragher*, 524 U.S. at 776; *Ellerth*, 524 U.S. at 757-58. In quid pro quo harassment cases, employer liability stems from the agency relationship between an employer and supervisor because such harassment involves a tangible employment action. A tangible employment action is “a significant change in employment such as hiring, firing, promotion, compensation, and work assignment.” *Ellerth*, 524 U.S. at 761. An agent could not threaten or commit tangible employment actions without the authority given to him by his employer. Balancing the purpose of Title VII to create a safe workplace with the “assurance [that] the injury could not have been inflicted absent the agency relation,” *id.* at 761-62, results in strict liability for employers in cases of quid pro quo harassment, *see id.* at 760-61.

9.3.2 Because Section 200 prohibits actions which require an agency relationship between the harassing supervisor and his employer, strict liability is appropriate in this case. Under Section 200, “any person who offers employment or who threatens dismissal or who threatens the imposition of any other penalty against

another person in the course of employment as a means of obtaining sexual favours shall commit an unfair labour practice.” Labour Code Order, 1992. “Threats of dismissal” or “penalt[ies] . . . in the course of employment,” are tangible employment actions that could not be committed unless the agent had the employer’s authority to do so. *Id.* Strict liability is appropriate under Section 200 because tangible employment actions are prohibited and could not be committed absent an agency relation between the harassing supervisor and their employer. The definition of employer demonstrates that the drafters intended to hold employers responsible for its agents. The Labour Code defines an employer as any person or . . . corporation [or] company . . . which employs any person to work under a contract and includes . . . *any agent, representative, foreman or manager* of such person, . . . corporation [or] company . . . who is placed in authority over the employee

Labour Code Order, 1992 sec. 3 (emphasis added). If the drafters intended for corporations to be independent from the actions of its supervisors, the definition of employer would not “include” supervisors. *Id.*; *see also Meritor*, 477 U.S. at 72 (citing 42 U.S.C. sec. 2000e(b) (2018)) (holding that a similar definition of employer under Title VII, which includes “any agent of such a person,” was grounds to consider agency principles in determining employer liability). The Labour Code’s definition of employer includes supervisors because, as in Title VII, the employer is liable for unfair labour practices committed by its supervisor.

- 9.3.3 Precedent demonstrates that this Court regularly reads employer liability for agents into the Labour Code. In *Bulane*, the manager terminated the applicant because he was a “member of a troublesome union,” (LC/04/2015) LSLC 43 at para. 6, which violated the Labour Code under the provision that “[a]ny person who seeks . . . by dismissal . . . to induce an employee to refrain . . . from continuing to be a member . . . of a trade union shall commit an unfair labour practice,” *id.* at para. 14 (citing Labour Code Order, 1992 sec. 196(2)). Although the manager committed an unfair labour practice, the Labour Court, as a matter of routine, ordered the respondent employer to pay the applicant compensatory damages. *See id.* at para. 26; *see also Lesotho Carton (Pty) Ltd.*, (LC/64/04)

LSLC 5 at *15-16 (ordering the employer to pay compensatory damages to each complainant after the complainants' managers terminated them in a procedurally unfair manner).

- 9.3.4 Throughout Part XV of the Labour Code, “any person” may be held liable for an unfair labour practice, including under Section 200. Labour Code Order, 1992. The Labour Court has held the employer is liable when its manager is that “any person” to commit an unfair labour practice, as in *Bulane* and *Lesotho Carton*. This is consistent with the logic behind the U.S. standard that “the supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees.” *Ellerth*, 524 U.S. at 762. The tangible employment actions taken under quid pro quo harassment, like other unfair labour practices committed by supervisors, “fall within the special province of the supervisor.” *Id.* These actions could not be committed without the authority given to the supervisor by the employer, thus rendering the employer liable for the supervisor’s actions.
- 9.3.5 Section 200 and the Labour Code as a whole are consistent with the *Faragher/ Ellerth* standard that an employer is liable when the authority it gives to a supervisor is abused to commit quid pro quo harassment. For months, Mr. Y.Z. abused the authority he was given by Mining Company to wield tangible employment actions against Ms. A.B. as a means of obtaining sexual favours. This includes when Mr. Y.Z. denied her a full-time contract and a raise because she would not have sex with him or send him nude photographs, and when he forcibly groped her under threat that he would terminate her employment. Mr. Y.Z. was only able to commit quid pro quo harassment against Ms. A.B. because Mining Company gave him the power to do so. Therefore, Mining Company should be held strictly liable for the quid pro quo harassment that Ms. A.B. suffered, per the *Faragher/ Ellerth* standard.
3. Mining Company is Liable for the Hostile Work Environment Harassment that Ms. A.B. Suffered Because Mining Company Failed to Take Reasonable Steps to Establish Protective Measures to Stop the Harassment.

- 9.4 The U.S. Supreme Court established an affirmative defence in order to incentivize employers to implement effective protective measures against harassment. An employer

will be found liable for its supervisor's hostile work environment harassment unless it can prove the two prongs of the affirmative defence: (1) that it established effective procedures to prevent and promptly remedy the abusive situation and (2) that the victim of harassment unreasonably failed to make use of the protective procedures made available by the employer. *See Faragher*, 524 U.S. at 805. The standard balances common law agency principles with the policy of encouraging employers to create and maintain a harassment-free working environment. *See Ellerth*, 524 U.S. at 764; *see also Faragher*, 524 U.S. at 802.

9.4.1 The purpose of Section 200 of the Labour Code is to prevent harassment in the workplace. The Codes of Good Practice expand on the employer's responsibility to maintain a safe workplace. Section 60(1) states that "an employer should create and maintain a working environment in which the dignity of each employee is respected." Labour Code (Codes of Good Practice) Notice 2003. The Codes also detail how an employer should respond to notices of harassment. *Id.* at secs. 61-69. These sections establish that an employer has a constant duty to "create and maintain" a harassment-free workplace and respond appropriately to incidents of harassment. *Id.* at sec. 60(1). The *Faragher/ Ellerth* standard was created to uphold the Title VII objective of encouraging employers to prevent harassment and encouraging victims to use the employer's protective measures when they experience harassment. *See Ellerth*, 524 U.S. at 764-65; *see also Faragher*, 524 U.S. at 805-806. The Codes of Good Practice indicate that the Labour Code shares that objective, and therefore the *Faragher/ Ellerth* standard is the appropriate standard for the Court to apply in this case.

9.4.2 This Court should adopt the *Faragher/ Ellerth* standard and hold Mining Company liable because (1) it failed to take the reasonable steps to prevent and promptly remedy harassment by not providing a harassment policy or complaint procedure, and (2) Ms. A.B. had no way to report her harassment and therefore did not fail to make use of the protective measures made available to her.

- a. *Mining Company Failed Take Reasonable Steps to Prevent Harassment Because It Did Not Have a Clear and Accessible Policy and Complaint Procedure for Victims of Harassment.*

9.5 Mining Company cannot meet the burden of proof under the first prong of the *Faragher/ Ellerth* affirmative defence because it lacked a harassment policy or complaint procedure. Ms. A.B. had no opportunity to report her harasser and was forced to suffer months of consistent, traumatic harassment. The first prong places the burden of proof on the employer to show that it took reasonable steps to prevent and promptly address harassment. It is generally necessary for the employers to maintain an antiharassment policy and a complaint procedure. *See* EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC-CVG-1999-2 (U.S.) (1999).² While the harassment policy is not required by law, it is very difficult for an employer to meet the burden of proof for the first prong without one. *See id.*; *see also Faragher*, 524 U.S. at 778. Mining Company fails under the first prong because there was no antiharassment policy or complaint procedure communicated to the employees despite a grossly open culture of harassment against female employees at its workplace.

9.5.1 In *Faragher*, the U.S. Supreme Court determined that the defendant employer did not meet the burden under the first prong because the existing policy was not disseminated among the employees involved in the harassment and the employer did not monitor the conduct of harassers in the workplace. 524 U.S. at 782. Likewise, at Mining Company there was no antiharassment policy distributed to employees. Even if Mining Company did have a policy or complaint procedure, as in *Faragher*, “it completely failed to disseminate its policy” among its employees. *Id.* Two of Ms. A.B.’s co-workers acknowledged a history of women workers being harassed by male managers of Mining Company, but neither knew of any reporting process or whether any victim had reported before. Without a clear antiharassment policy or complaint procedure, Ms. A.B. and her female peers were “completely isolated from . . . higher management,” *id.* at 778, and they had no guidance from the corporation on how to “bypass” their harassing supervisors and seek help, *see id.* at 808.

² U.S. Equal Emp. Opportunity Comm’n, EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC-CVG-1999-2 (1999), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors>.

9.5.2 Ms. A.B. was just one victim of the pervasive culture of harassment at Mining Company; many women experienced harassment openly in the workplace without any resources in place to assist them. The incidents of harassment were egregiously open and yet Mining Company “made no attempt to keep track of the conduct of supervisors.” *Id.* at 778. As in *Faragher*, there was a failure of Mining Company to protect their female employees from harassment through a policy and complaint procedure. The Court in *Faragher* declined to continue to the next step in the affirmative defence because the employer in that case failed the first prong. *Id.* at 808-09. Accordingly, this Court should deny Mining Company the affirmative defence for its failure on the first prong alone and hold it vicariously liable for Mr. Y.Z.’s hostile work environment harassment.

b. Ms. A.B. Had No Clear Harassment Complaint Procedure to Pursue, and She Was Forced into Silence by Mr. Y.Z.

9.6 Mining Company cannot meet the burden of proof under the first prong of the affirmative defence; if the Court should choose to proceed to the second prong of the affirmative defence, Mining Company cannot meet the burden of proof under the second prong because Ms. A.B. did not have a clear complaint procedure accessible to her and Mr. Y.Z. threatened her job to keep her quiet. Under the second prong of the affirmative defence, an employer may avoid liability if it can prove that the victim unreasonably failed to use the employer’s provided protective procedures. *Id.* at 778. An employer cannot meet its burden under the second prong if the victim did not report her harassment out of fear caused by threats made by her harasser. *Kramer v. Wasatch Cnty. Sheriff’s Office*, 743 F.3d 726, 740 (10th Cir. 2014). The employer also cannot meet the burden if the employee did not report under reasonable belief that the reporting mechanism was ineffective, that there would be retaliation against her for reporting, or that there were obstacles to reporting. See EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC-CVG-1999-2 (U.S.) (1999).³

9.6.1 There was no clear or confidential complaint procedure at Mining Company, and Ms. A.B. took the reasonable steps of disclosing her harassment to two co-

³U.S. Equal Emp. Opportunity Comm’n, EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC-CVG-1999-2 (1999), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors>.

workers, one of whom was an experienced member of staff whom many people came to for advice. Neither co-worker knew how to report harassment. Even if a policy existed, the fact that her co-workers were unaware of it establishes that Mining Company failed in distributing the policy in the workplace. *See Faragher*, 524 U.S. at 782.

- 9.6.2 It was reasonable for Ms. A.B. to not seek assistance from another supervisor or superior because Mr. Y.Z. threatened to fire Ms. A.B. if she told anyone about his harassment. In *Kramer*, the employer could not meet its burden under the second prong, despite having an anti-harassment policy and complaint procedure in place, because the victim did not report her harassment due to threats of termination by her harasser. 743 F.3d at 751. The harassing supervisor in *Kramer* threatened his victim that it would be a “career ender” if she told anyone that he assaulted her at work, just as Mr. Y.Z. threatened Ms. A.B.’s job and told her that he would “make her life bad” if she disclosed that he assaulted her. *Id.* at 733. Like Ms. A.B., the victim in *Kramer* was too afraid to report the harassment after that threat. *Id.* Furthermore, Mining Company had no company policy and complaint procedure which offered Ms. A.B. the opportunity to bypass her harasser and report him to higher management.
- 9.6.3 Without a clear policy, reporting procedure, or oversight by Mining Company, Ms. A.B. had to suffer harassment for months and, through no fault of her own, could not report the abuse that she faced. Mining Company cannot succeed under either prong of the affirmative defence to rebut that it is liable for the hostile work environment harassment that Ms. A.B. suffered.

4. Mining Company Must Be Held Vicariously Liable for Failing to Protect Ms. A.B. from the Constant Harassment She Suffered in the Workplace at the Hands of Mr. Y.Z.

- 9.7 Mining Company grossly failed to oversee an agent entrusted with its authority and maintain a safe workplace, despite open harassment, and Ms. A.B. is just one of many women who suffered as a result of its failure. Mr. Y.Z. used his position of authority to harass and traumatize Ms. A.B. for months. His harassment would not have been possible had Mining Company not given him a supervisory position over female employees like Ms. A.B. Because Mining Company failed to provide any anti-

harassment policy, complaint procedures, or oversight, Ms. A.B. could not report her harassment and had to suffer in silence. Mining Company must be held liable for the hostile work environment harassment that its agent inflicted against Ms. A.B., which it did nothing to effectively prevent.

Applicant Details

First Name **Alexander**
 Last Name **Cyr**
 Citizenship Status **U. S. Citizen**
 Email Address alexander.cyr@wustl.edu
 Address

Address
Street
1011 Hansen Rd
City
Livermore
State/Territory
California
Zip
94550

Contact Phone Number **9259807470**

Applicant Education

BA/BS From **University of California-Berkeley**
 Date of BA/BS **May 2017**
 JD/LLB From **Washington University School of Law**
http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014
 Date of JD/LLB **May 20, 2021**
 Class Rank **Not yet ranked**
 Does the law school have a Law Review/Journal? **Yes**
 Law Review/Journal? **No**
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Osgood, Russell
rosgood@wustl.edu
Hubertz, Elizabeth
ejhubertz@wustl.edu
314-935-8760
Ron, Levin
rlevin@wustl.edu

References

Magistrate Judge Patricia Cohen –
Patricia_Cohen@moed.uscourts.gov cc:
Roxane_Ellis@moed.uscourts.gov, 314-244-7550

Magistrate Judge Gilbert Sison – Gilbert_Sison@ilsd.uscourts.gov,
(618) 482-9077

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Alexander Cyr
249 Union Blvd Apt 4318
St. Louis, MO 63108

April 8, 2022

The Honorable Elizabeth W. Hanes
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am writing to apply for a clerkship for the term beginning September 5 2022. I am currently a 3L at the Washington University School of Law.

As a law student with a variety of interests and experiences, I believe I would make a strong addition to your chambers. My work experience reflects a commitment to building broad legal experience to develop my skills. I have developed an interest in public interest law, having interned for a local government, as well as working in an environmental law clinic and taking related courses such as administrative law and an environmental litigation seminar. I have also served as a judicial extern last semester to Magistrate Judge Patricia Cohen at the District Court for the Eastern District of Missouri. As a judicial extern I was able to polish my legal research, analysis and writing and learn a great deal about applying it in the context of chambers to a variety of cases and legal problems.

My resume, writing sample, references, and transcript are submitted with this application. I look forward to communicating further about this opportunity.

Respectfully,

Alexander Cyr

ALEXANDER D. CYR

249 Union Blvd Apt 4318, St. Louis MO 63108
alexander.cyr@wustl.edu | 925-980-7470

EDUCATION

Washington University School of Law	St. Louis, MO
<i>J.D. Candidate</i> GPA: 3.47	May 2022
<i>J.D. Certificate in Business & Corporate Law</i> <i>J.D. Certificate in Public Interest Law</i>	
<u><i>Honors & Activities:</i></u>	Scholar in Law Award (merit-based scholarship) Graduate Policy Scholars Program Graduate Impact Forum Advisory Committee Washington University School of Law ABA Representative Student Bar Association, Representative and Executive Board Member International Law Society, Treasurer & Member
<u><i>Clinics & Externships:</i></u>	Interdisciplinary Environmental Clinic, Judicial Clerkship Externship
University of California, Berkeley	Berkeley, CA
<i>B.A. in Economics</i>	May 2017
<u><i>Honors:</i></u>	Regents' and Chancellor's Scholarship (most prestigious scholarship)

EXPERIENCE

Professor Jens Frankenreiter	St. Louis, MO
Senior Research Assistant	September 2021 – Present
<ul style="list-style-type: none"> Serve as point of contact and supervisor for junior research assistants during the fall semester Other research tasks as assigned 	
Research Assistant	May – August 2021
<ul style="list-style-type: none"> Gathered, analyzed and provided initial data on corporate bylaws 	
U.S. District Court, Eastern District of Missouri	St. Louis, MO
Judicial Extern to the Honorable Judge Patricia L. Cohen	September – December 2021
<ul style="list-style-type: none"> Draft legal memoranda for the use of the court for cases including social security appeals and interpleader case Observe hearings, trials and other court proceedings 	
Goffstein Law	St. Louis, MO (Remote)
Contractor Law Clerk	April 2021
<ul style="list-style-type: none"> Performed research and drafted work product for client law firm 	
Washington University – Interdisciplinary Environmental Clinic	St. Louis, MO
<i>Student Attorney</i>	Jan – May 2021
<ul style="list-style-type: none"> Drafted memoranda on water quality, emphasizing legal and technical issues Helped prepare for oral argument on dispositive motions in federal district court Worked with student consultants from other Washington University degree programs Communicated with client about work progress and client priorities 	
San Francisco City Attorney's Office	San Francisco, CA
<i>Legal Intern</i>	Jun – Aug 2020
<ul style="list-style-type: none"> Researched city ordinance issues such as parking meter violations and vehicle code preemption Wrote memos pursuant to legal research in collaboration with other interns Attended team meetings and Municipal Transportation Agency board meetings 	

SKILLS & INTERESTS

Animal Welfare, Biking, Cooking, Hiking, Science Fiction

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Washington University in St. Louis

Office of the University Registrar

Page 1 of 2

Record Of: **Cyr, Alexander D**

Current Programs Of Study:

Student ID Number: 479095

JURIS DOCTOR

Transcript Issued 04/06/2022 To:

RECIPIENT AS DESIGNATED BY STUDENT

Fall Semester 2019

LEGAL RESEARCH METHODOLOGIES I	LAW	W74 500D	0	CIP
LEGAL PRACTICE I: OBJECTIVE ANALYSIS AND REASONING (LEWIS)	LAW	W74 500F	2.0	B-
CONTRACTS (DEGEEST)	LAW	W74 501D	4.0	B
TORTS (NORWOOD)	LAW	W74 515F	4.0	A
CONSTITUTIONAL LAW I (OSGOOD)	LAW	W74 520C	4.0	B+

Enrolled Units 14.0

Semester GPA 3.40

Cumulative Units 14.0

Cumulative GPA 3.40

Spring Semester 2020

LEGAL RESEARCH METHODOLOGIES II	LAW	W74 500E	1.0	HP
LEGAL PRACTICE II: ADVOCACY (LEWIS)	LAW	W74 500G	2.0	CR
CRIMINAL LAW (GARDNER)	LAW	W74 502T	4.0	CR
NEGOTIATION (TOKARZ)	LAW	W74 503G	1.0	CR
CIVIL PROCEDURE (LEVIN)	LAW	W74 506	4.0	CR
PROPERTY (SACHS)	LAW	W74 507W	4.0	CR

Enrolled Units 16.0

Semester GPA 3.94

Cumulative Units 30.0

Cumulative GPA 3.44

Fall Semester 2020

EVIDENCE (ROSEN)	LAW	W74 547K	3.0	B+
INTERNATIONAL LAW (SADAT)	LAW	W74 553B	3.0	B
LAWYER ETHICS (ROSEN)	LAW	W74 561D	2.0	B+
TRANSNATIONAL LITIGATION (WATERS)	LAW	W74 574F	3.0	B+
BANKRUPTCY (KEATING)	LAW	W74 645A	3.0	A-
ENVIRONMENTAL LITIGATION SEMINAR (MANDELKER)	LAW	W76 663S	3.0	A

Enrolled Units 17.0

Semester GPA 3.47

Cumulative Units 47.0

Cumulative GPA 3.46

Spring Semester 2021

ADMINISTRATIVE LAW (LEVIN)	LAW	W74 530A	3.0	A
COMPARATIVE LAW (GARLICKI)	LAW	W74 535J	2.0	C
CORPORATIONS (SELIGMAN)	LAW	W74 538L	3.0	B+
INTERDISCIPLINARY ENVIRONMENTAL CLINIC	LAW	W74 704B	6.0	P
THE LAW AND POLICY OF THE RAILS-TO-TRAILS CONSERVANCY MOVEMENT	LAW	W74 806K	1.0	P

Enrolled Units 15.0

Semester GPA 3.40

Cumulative Units 62.0

Cumulative GPA 3.45

Fall Semester 2021

ANTITRUST (DROBAK)	LAW	W74 611C	3.0	B+
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Keri A. Disch, University Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD A LIGHT SOURCE



Washington University in St. Louis

Office of the University Registrar

Page 2 of 2

Record Of: **Cyr, Alexander D**

Student ID Number: 479095

Fall Semester 2021

INVESTOR-STATE ARBITRATION (KHAN)	LAW	W74 612D	1.0	B+
INTERNATIONAL COURTS AND TRIBUNALS - PRACTICE AND PROCEDURE (SISON)	LAW	W74 619B	2.0	B+
FEDERAL COURTS (DROBAK)	LAW	W74 634D	3.0	A-
JUDICIAL CLERKSHIP EXTERNSHIP	LAW	W74 654E	4.0	CR
INTRODUCTION TO EUROPEAN UNION LAW	LAW	W74 805B	3.0	AUD

Enrolled Units 16.0 Semester GPA 3.54 Cumulative Units 75.0 Cumulative GPA 3.46

Spring Semester 2022

PRIVATE EQUITY TRANSACTIONS (WOLFE)	LAW	W74 566C	1.0	B+
SECURITIES LAW LITIGATION AND ARBITRATION (CAPRIGLIONE)	LAW	W74 568B	2.0	
SECURITIES REGULATION (SELIGMAN)	LAW	W74 569C	3.0	
CRIMINAL PROCEDURE: ADJUDICATION (EPPS)	LAW	W74 580T	3.0	
MULTI-PARTY AND PUBLIC POLICY DISPUTE RESOLUTION THEORY AND PRACTICE (REEVES)	LAW	W74 661B	3.0	PW
COMMERCIAL LAW (KEATING)	LAW	W74 702D	3.0	
FOREIGN AFFAIRS LAW (BERMAN)	LAW	W74 725C	1.0	A
CORPORATE GOVERNANCE & CONTROL SEMINAR (SHILL)	LAW	W76 857S	3.0	

Enrolled Units 19.0 Semester GPA 3.70 Cumulative Units 77.0 Cumulative GPA 3.47

Remarks

SP2020 SPECIAL NOTE: DURING THE SPRING OF 2020, A GLOBAL PANDEMIC REQUIRED SIGNIFICANT CHANGES TO COURSEWORK. UNUSUAL ENROLLMENT PATTERNS AND GRADES MAY REFLECT THE TUMULT OF THE TIME.
 FL2021 CERTIFICATE GRANTED: CERTIFICATE IN PUBLIC INTEREST LAW

***** END OF TRANSCRIPT *****

Keri A. Disch
 Keri A. Disch, University Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD A LIGHT SOURCE

Washington University in St. Louis

SCHOOL OF LAW

March 17, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

RE: Recommendation for Alexander Cyr

Dear Judge Hanes:

It is my pleasure to recommend Alexander Cyr to you as a post-graduation clerk. Alexander is in the final semester of his third year here at Washington University School of Law, where I am the Interim Dean and a Professor of Law. Before this, I was the President of Grinnell College (1998-2010) and, prior to that, the Dean (1988-1998) and a faculty member (1980-1998) at Cornell Law School in Ithaca, New York.

I first got to know Alex in the fall of 2019 when I had him as a student in our basic Constitutional Law course (structure and functions). Alex was a frequent and thoughtful contributor to class discussions. He wrote a fine mid-semester paper on a seemingly obscure but important set of cases in constitutional law, the Insular Cases, which involved the powers and obligations of the U.S. federal government vis-à-vis territorial governments. It was a sophisticated topic, and Alex did a fine job. He performed above the mean on a complex final examination.

Alex has worked hard at law school. He has done very well in our interdisciplinary environmental clinic and served as the supervising research assistant for Professor Frankenreiter, a prolific and hardworking scholar who is demanding and a good judge of people. In the Environmental Clinic, he had to prepare from the ground up – in six days – for oral argument on a water quality issue involving the Missouri Department of Natural Resources and the Environmental Protection Agency.

Alex would interact well with others in chambers; he is cooperative, friendly, and diligent. He listens well and is a good researcher. I would be happy to talk with you or anyone in your chambers about Alex and his interest in being a clerk (Cell #: 641-821-3712).

Best,

/s/

Russell K. Osgood
Interim Dean
Visiting Professor of Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Russell Osgood - rosgood@wustl.edu

Washington University in St. Louis

SCHOOL OF LAW

March 16, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

RE: Recommendation for Alexander Cyr

Dear Judge Hanes:

I am pleased to recommend to you Alexander Cyr for a clerkship, in your chambers. Alex is a third year law student at Washington University School of Law and my former student in the Interdisciplinary Environmental Clinic which I direct.

In spring 2021, Alex worked on one of my teams in the Clinic. In the Clinic, law students are assigned to teams with students from other schools on campus. Alex was assigned to work with an undergraduate political science student on the latest permutation of Missouri's water quality standards for nutrients. The matter involves federal litigation of an EPA administrative decision as well as state and federal administrative processes related to specific waterbodies affected by the regulations.

Alex was very organized in his research and took on a leadership role in preparing the team's work. Although the federal case moved quickly, he was able to keep up with the pace. His excellent research skills were essential to the team's ability to respond to developments in the litigation even though some very esoteric matters of administrative law were involved. He found answers to litigation questions quickly and presented them clearly in a manner that was easy to understand. It was a challenging matter and he was up to the task.

Alex was also a good student in the seminar portion of the course. His in-class questions were serious yet also practical and I believe he did a good job of voicing what others were having a harder time saying. He was also an accomplished negotiator; a skill which will serve him well in practice but which also speaks to his ability to work with and understand people.

Alex will be a wonderful law clerk and I believe you will enjoy working with him as well. If you have any questions about him or his application, please don't hesitate to contact me by email (ejhubertz@wustl.edu) or phone. My cellphone number is 312-307-1732 and is usually a better way to reach me than my office phone.

Best,

/s/

Elizabeth Hubertz
Assistant Professor of Practice
Assistant Director of the Interdisciplinary Environmental Clinic

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Elizabeth Hubertz - ejhubertz@wustl.edu - 314-935-8760

Washington University in St. Louis

SCHOOL OF LAW

March 24, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

RE: Recommendation for Alexander Cyr

Dear Judge Hanes:

Alexander Cyr, a student in the Washington University School of Law class of 2022, has asked me to write in support of his application to serve as a clerk in your chambers following his graduation. I am happy to recommend him for your consideration.

Alex has been a student in two of my courses: Civil Procedure in Spring 2020 and Administrative Law in Spring 2021. Civil Procedure was graded on a credit/no credit basis due to the pandemic. In Administrative Law, Alex earned an A grade, ranking in the top third among all the students in that class. (To help you put that datum into perspective, I should mention that our school currently ranks well within the top ten law schools in the country in terms of the GPA and LSAT scores of students in the entering classes.)

In his Administrative Law exam paper, which I have reread for purposes of writing this letter, Alex displayed broad knowledge about administrative law doctrines. He recognized the major issues underlying the respective questions, and he discussed them with intelligence and nuance. In addition, his writing was concise and easy to follow.

This strong exam performance was consistent with my observations of Alex in the "classrooms" (including virtual Zoom classrooms). I found him to be conscientious about his course responsibilities, very willing to participate in class discussions, and very thoughtful in his comments. In addition, he has been a good citizen of the law school.

In short, I believe that Alex is a strong candidate for a good clerkship, and I hope you will give serious consideration to hiring him. Please feel free to be in touch with me if I can furnish any other information that would be useful to you.

Best,

/s/

Ronald Levin
William R. Orthwein Distinguished Professor of Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Levin Ron - rlevin@wustl.edu

DRAFT

WRITING SAMPLE

Alexander Cyr
249 Union Blvd Apt 4318
St. Louis, MO 63108
925-980-7470

As a judicial extern at the District Court for the Eastern District of Missouri, I prepared the attached draft memorandum and order for an interpleader case before the judge. The draft memorandum and order examined whether one of the defendants in interpleader was entitled to summary judgment and the interplead funds.

To preserve confidentiality, all individual and law firm names have been redacted, as well as the case number. I have received permission from chambers to use this draft memorandum and order as a writing sample.

DRAFT

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

A)	
)	
Plaintiff in interpleader,)	
)	
v.)	Case No. X:XX-cv-XXXXX
)	
B, in her capacity as Executor of the)	
Estate of D, deceased,)	
)	
and)	
)	
C)	
)	
Defendants in interpleader,)	

DRAFT MEMORANDUM AND ORDER

Plaintiff A (A) brought this interpleader action, under 28 U.S.C. § 1335, asking the Court to determine the proper recipient of assets being held in a transfer on death account (TOD account) opened by the decedent, D. [ECF No. 1]. D named the Defendant C (C) as the beneficiary in an agreement related to the establishment of the TOD account. [ECF No. 1]. Defendant B (B), in her capacity as executor of D’s estate, contested the distribution of the TOD account’s assets to C. [ECF No. 1]. C deposited all assets, or the proceeds thereof, previously held in the TOD account into the registry of the Court, and the Court has discharged C from further liability and dismissed it from the suit. [ECF No. 37].

This matter is before the Court on C’s motion for summary judgment (Motion). [ECF No. 38]. B has not opposed the motion for summary judgment.

I. Background

This cause of action concerns a custodial account administered by C. Decedent D opened the account on July 6, 2012 and was the holder of the account at the time of her death. [ECF Nos.

DRAFT

40, 40-1] On the same day, she executed a Security Transfer on Death Beneficiary Agreement (the “TOD Agreement”) relating to the account and listing C as the beneficiary. This is despite the fact that the agreement further states that the account owner may only designate as the beneficiary a natural person, who may not be acting in the capacity of trustee, executive, or personal representative. However, the agreement provided that A would review the document to ensure that its requirements were met. [ECF No. 40-2]. The agreement further stated that in case of the requirements not being met, A would reject and return the form. A did not reject and return the form. [ECF No. 40]. When D died, C was the only named beneficiary of the account. [ECF No. 40].

The estimated value of the assets held in the account was \$1,258,708.79 at the time of the filing of the interpleader action. Defendants C and B dispute the validity of the TOD Agreement as completed by the Decedent.

Due to the multiple claims presented to C for Decedent D’s assets, C filed this interpleader action under 28 U.S.C. § 1335. *See*, Interpleader Complaint [ECF No. 1], filed December 21, 2020. Each defendant filed a timely answer to the interpleader complaint. [ECF Nos. 7, 8, 14, 17] C deposited the proceeds from liquidating some of account’s assets with the Court’s registry and delivered physical custody of United States savings bonds with a face value of \$31,200.00, which could not be liquidated. [ECF No. 26]. In August 2021, C was granted dismissal from the case and a permanent injunction. [ECF No. 37]. The Court granted, in part, C’s motion for reimbursement of attorney’s fees and costs that it incurred in connection with the filing of the interpleader suit, and entered an award in favor of C in the amount of \$17,705.60 to be paid from the interplead funds. [ECF Nos. 45, 46].

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On August 17th, 2021, C filed the Motion, along with a memorandum in support, its statement of uncontroverted material facts, and exhibits, seeking a judgment determining that it is the rightful owner of the TOD assets. [ECF Nos. 38, 39, 40]. B did not respond to C's Motion.

II. Legal Standard

Summary judgment is appropriate when no genuine issue of material fact exists in the case and the movant is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The initial burden is placed on the moving party. City of Mt. Pleasant, Iowa v. Associated Elec. Co-op., Inc., 838 F.2d 268, 273 (8th Cir. 1988). If the record demonstrates that no genuine issue of fact is in dispute, the burden then shifts to the non-moving party, who must set forth affirmative evidence and specific facts showing a genuine dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In determining whether summary judgment is appropriate in a case, the evidence must be viewed in the light most favorable to the nonmoving party. Osborn v. E.F. Hutton & Co., Inc., 853 F.2d 616, 619 (8th Cir. 1988). Self-serving, conclusory statements without support are insufficient to defeat summary judgment. Armour & Co., Inc. v. Inver Grove Heights, 2 F.3d 276, 279 (8th Cir. 1993).

Because Defendant B did not respond to the Motion for Summary Judgment or submit a listing of material facts to which she contends a genuine issue exists, Defendant C's material facts are admitted. See Norwood v. Potter, 363 Fed. App'x 415, 416 (8th Cir. 2010); *see also* Local Rule 4.01(E): ("All matters set forth in the moving party's Statement of Uncontroverted Material Facts shall be deemed admitted for purposes of summary judgment unless specifically controverted by the opposing party.") If a party "fails to properly address another party's assertion of fact, as required by Fed. R. Civ. P. 56(c), the Court may ... grant summary judgment if the motion and supporting materials – including the facts undisputed – show that the movant is entitled

DRAFT

to it.” Fed. R. Civ. P. 56(e)(3). However, defendant B’s failure to respond to defendant C’s motion does not mean summary judgment should be automatically granted in favor of C. Even if the facts as alleged by C are not in dispute, those facts still must establish that they are entitled to judgment as a matter of law. Saffell v. Wilson, No. 4:19-CV-00202 JAR, 2020 WL 7695417 (E.D. Mo. Dec. 28, 2020).

III. Discussion

C contends it is entitled to judgment as a matter of law because C had discretion to determine whether to accept the TOD Agreement, and that C did in fact accept the TOD Agreement. It contends that because the TOD Agreement stated that C would review it and reject it if the beneficiary did not meet their requirements and because the information was included on statements, C must have actively approved the Agreement as filled out by Decedent. It contends that with no party contesting these factual assertions and with the interpleader funds having been paid into the court registry there is no factual or legal dispute between C and Defendant B.

A. Choice of Law

When the Court exercises diversity jurisdiction, it must apply the choice of law provisions of the forum state. Am. Fire & Cas. Co. v. Hegel, 847 F.3d 956, 959 (8th Cir. 2017), *citing* Whirlpool Corp. v. Ritter, 929 F.2d 1318, 1320 (8th Cir. 1991). Under Missouri choice of law provisions, the standard is that “a valid choice of law provision in a contract binds the parties[.]” BancorpSouth Bank v. Hazelwood Logistics Center, LLC, 706 F.3d 888, 893 *citing* State ex rel. McKeage v. Cordonnier, 357 S.W.3d 597, 600 (Mo. 2012) (en banc). The TOD agreement states that “[t]he provisions and protection of TOD security registration statutes and/or regulations as adopted in the state whose law governs the Account shall apply.” The Account was created under the Custody Agreement dated the same day which states that “[t]his Agreement shall be governed

DRAFT

by and construed in accordance with the laws of the State of Minnesota applicable to agreements made and to be performed in Minnesota.” The Court will therefore apply Minnesota law in resolving this dispute.¹

B. Statutory Scheme

Minnesota has enacted the Uniform TOD Security Registration Act (the “TOD Act”) as sections 524.6-301 to 311 of the state code. This statutory scheme lays out what is needed for a valid TOD agreement under the laws of Minnesota. The purpose of TOD accounts is to allow securities to be passed to named beneficiaries quickly and easily at the passing of their owners, without a need for the probate process. See In re Estate of Gloege, 649 No.W. 2d 468, 471 (Minn. Ct. App. 2002) (Property which is “payable on death” or “transferred on death” to a named beneficiary are nonprobate assets). Probate avoidance is often an important goal in modern estate planning, as the “evils of the probate system” have created the perception that “judicial administration is a thing to be avoided[.]” Nathaniel W. Schwickerath, Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes, 48 Drake L. Rev. 769 (2000).

First, the code lays out some of the definitions of terms used in the TOD Act which are not defined elsewhere in the code. Minn. Stat. Ann. § 524.6-301 (West). Next, the code states that for an individual to validly create a TOD registration, they must be the sole owner of the asset, or it must be registered by joint owners with right of survivorship. Minn. Stat. Ann. § 542.6-302

¹ For the beneficiary form to be upheld under Minnesota law, it must have been validly authorized by some state statute. Minn. Stat. Ann. § 524.6-303. All of the potential hooks for application occur in this case. C, the registering entity, is incorporated in Delaware, which recognizes TOD agreements. Del. Code Ann. tit. 12, § 801-12 (West). It is not clear from the pleadings where C’s “principal office” referred to in Minn. Stat. Ann. § 524.6-303 is precisely, but C’s “main office” is in Ohio, and it’s “principal place of business” is in Minnesota. [ECF No. 1]. Both Ohio and Minnesota recognize TOD agreements. Ohio Rev. Code Ann. § 1709.01-11; Minn. Stat. Ann. § 524.6-301 to 11 (West). It is not clear from the record which C office made the registration, but it appears to have been made in either Tennessee or Missouri, both of which recognize TOD agreements. Tenn. Code Ann. §§ 35-12-101 to 113; Mo. Ann. Stat. § 461.001 (West). Additionally, Tennessee was listed as Ms. Weil’s state of residence at the time of registration. [ECF No. 1]

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(West). A security “is registered in beneficiary form when the registration includes a designation of a beneficiary to take ownership at the death of the owner or the deaths of all multiple owners.” Minn. Stat. Ann. § 524.6-304. Registration is shown by the words “transfer on death” or “pay on death”, or the abbreviations “TOD” or “POD” between the name of the owner and the name of the beneficiary. Minn. Stat. Ann. § 524.6-305. Until the death of the owner or owners of the security, the registration has no effect and the consent of the beneficiary is not needed to cancel or change the registration. Minn. Stat. Ann. § 524.6-306. On the death of a sole owner of a TOD security, ownership “passes to the beneficiary[.]” Minn. Stat. Ann. § 524.6-307(1).² The transfer resulting from the TOD designation is non-testamentary, though it can be cancelled by specific reference in the owner’s will. Minn. Stat. Ann. § 524.6-309.

Acceptance of a request for registration constitutes an agreement to implement it on the death of the security owner, and discharges it from all claims by the estate. Minn. Stat. Ann. § 524.6-308. The code further gives the registering entity the power to establish the conditions under which it will accept registrations. Minn. Stat. Ann. § 524.6-310(a).

A security may be registered under the Minnesota code if authorized by statute in “the state of organization of the issuer or registering entity, the location of the registering entity’s principle office, the office of its transfer agent or its office making the registration, or by ... statute of the law of the state listed as the owner’s address at the time of the registration.” Minn. Stat. Ann § 524.6-303. This condition was fulfilled, as discussed in footnote one, *infra*.

Decedent D did fill out a form provided to her by A using the abbreviation “TOD” in order to designate C as the beneficiary. [ECF No. 40-2]. Here, D was the sole owner of the assets, and so D’s designation was sufficient to register the account in beneficiary form under the TOD Act.

² There are certain exceptions to the effect of a TOD registration related to the rights of creditors which have not been raised by any party to this case. Minn. Stat. Ann. § 524.6-307(2).

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D did not revoke, or attempt to revoke, the TOD designation during her lifetime or by specific reference in her will. As such, absent some other legal deficiency, ownership of the assets passed to C upon D's death.

Two issues in this case pertain to A's power to determine the conditions under which they would accept TOD Agreements, and whether any contrary requirements were waived in this case. The court must therefore determine whether it was in substantial compliance with the form to list as a beneficiary a juridical person rather than a natural person. The court must also determine whether the form allowed registration by an account owner resident in Tennessee, which state the form erroneously included in a list of states which do not recognize TOD Agreements.

C. Content Of and Compliance With Form

Under Minnesota law, banks offering TOD accounts may "establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form". Minn. Stat. Ann. § 524.6-310(a) (West). However, Minnesota law also provides that "[b]y accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner[.]" Minn. Stat. Ann. § 524.6-308 (West). The Court of Appeals of Minnesota has ruled that:

When the custodian of an individual retirement account (IRA) brings an interpleader action allowing the district court to determine a controversy between parties who each claim to be the rightful beneficiary of the IRA, the [trial] court, acting in equity, may determine that the named beneficiary is not the rightful beneficiary if the evidence establishes that the IRA owner has substantially complied with the IRA custodian's procedures for changing the IRA beneficiary or has done all that the owner reasonably believed was required by the custodian to change the IRA beneficiary.

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Gen. Mills Fed. Credit Union v. Lofgren, 839 N.W.2d 766, 767 (Minn. Ct. App. 2013). In that case, it was alleged that Lofgren had clearly established her intended new beneficiary through the forms given to her by her credit union, although they were not the prescribed forms for the task. Id. Although not directly controlling, the Minnesota Court of Appeals' reasoning appears to apply here. Although the Decedent did not strictly comply with the requirements of A's form, the uncontroverted facts show that it was accepted by C, Decedent's account statements reflected the designation of C as the TOD Agreement beneficiary, and that Decedent believed she had done what was necessary to establish C as the beneficiary.

1. State of Residence

The TOD Agreement states on its face that in order to be eligible for a TOD Agreement, the Account Owner must reside in a state which currently recognizes TOD Agreements for securities custody accounts, and that as of March 8, 2011 Tennessee (where the Decedent resided when the TOD agreement was signed) did not. However, Tennessee law has recognized TOD Agreements continuously since 1995. Tenn. Code Ann. §§ 35-12-101 to 113; COMMERCIAL INSTRUMENTS AND TRANSACTIONS—UNIFORM TRANSFER ON DEATH SECURITY REGISTRATION ACT—ADOPTION, 1995 Tennessee Laws Pub. Ch. 471 (H.B. 923). Additionally, in case of any doubt as to the law in Tennessee at the time of registration both Minnesota and Tennessee law provide in identical terms that “[a] registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.” Minn. Stat. Ann. § 524.6-303 (West), Tenn. Code Ann. § 35-12-104 (West). As Tennessee appears to have been included in the list of excluded states erroneously, the

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Court finds that this does not prevent a finding that the Decedent acted in substantial compliance with the form.

2. Juridical Person as Beneficiary

The C form also states that the beneficiary must be a natural person, which C is not. The Court must therefore determine whether designating C as a beneficiary is substantial compliance with the terms of the form. This involves a question of statutory interpretation. This Court's task in interpreting the Minnesota code is to "effectuate the intent of the legislature." State v. Jones, 848 N.W.2d 528, 535 (Minn. 2014). "If the Legislature's intent is discernible from the statute's plain and unambiguous language, the letter of the law shall not be disregarded under the pretext of pursuing its spirit." State v. Riggs, 865 N.W.2d 679, 682 (Minn. 2015), *citing* Citizens State Bank Norwood Young Am. v. Brown, 849 N.W.2d 55, 60 (Minn. 2014). This Court must therefore first determine if "the statute's language is ambiguous." Riggs at 682, *citing* State v. Peck, 773 N.W.2d 768, 772 (Minn. 2009).

Section 524.6-301 provides the following definition of "beneficiary form"

524.6-301. *Definitions*

In sections 524.6-301 to 524.6-311:

(1) "Beneficiary form" means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

Minn. Stat. Ann. § 524.6-301(1) (West). The term "person" is not defined within section 524.6-

301. However, section 524.1-201 does provide a definition of the term "person."

524.1-201. *General Definitions*

Subject to additional definitions contained in the subsequent articles which are applicable to specific articles or parts, and unless the context otherwise requires, in chapters 524 and 525:

...

(39) "Person" means an individual, a corporation, an organization, or other legal entity.

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Minn. Stat. Ann. § 524.1-201(39) (West). This definition applies to section 524.6-301 “unless the context otherwise requires[.]” Minn. Stat. Ann. § 524.1-201(39) (West). This Court finds that the context of section 524.6-301(1) does not require that the definition of “person” as set out in section 524.1-201(39) to not apply. Because the definition of “person” in section 524.1-201(39) includes “corporation[s],” this Court finds that a beneficiary of a transfer-on-death account may be a corporation.³ Therefore, this Court finds that C may be a proper beneficiary of the pay-on-death account of the Decedent. The form’s restriction is therefore a discretionary matter for C, rather than a requirement of Minnesota law. Because C did not reject the form as submitted by the Decedent and did in fact comply, C accepted the designation of a juridical person as beneficiary. This Court therefore finds that this represents substantial compliance with the terms of the form.

IV. Conclusion

Based on the forgoing, the Court finds that no material factual or legal dispute exists and C is entitled to summary judgment.

Accordingly,

IT IS HEREBY ORDERED that defendant C’S motion for summary judgment [ECF No. 38] be and is **GRANTED**.

IT IS FUTHER ORDERED that the Clerk of the Court is hereby directed to release the sum of \$_____ to defendant C from the interpleader funds filed in this cause of action.

³ Tennessee law likewise provides that “person” includes “a corporation, an organization, or other legal entity[.]” Tenn. Code Ann. § 35-12-102(4) (West).

Applicant Details

First Name **Ryan**
 Middle Initial **M**
 Last Name **D'Ercole**
 Citizenship Status **U. S. Citizen**
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Lexington
State/Territory
Virginia
Zip
24450
Country
United States

Contact Phone Number **5712697133**

Applicant Education

BA/BS From **Christopher Newport University**
 Date of BA/BS **May 2016**
 JD/LLB From **Washington and Lee University School of Law**
http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=54704&yr=2009
 Date of JD/LLB **May 13, 2022**
 Class Rank **25%**
 Law Review/Journal **Yes**
 Journal(s) **Washington and Lee Law Review**
 Moot Court Experience **Yes**
 Moot Court Name(s) **John W. Davis Appellate Advocacy Competition**

Bar Admission

Prior Judicial Experience

Judicial
Internships/ **Yes**
Externships
Post-graduate
Judicial Law **No**
Clerk

Specialized Work Experience

Professional Organization

Organizations **Just The Beginning Foundation**

Recommenders

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References

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Allison Weiss, Professor of Practice–Legal Writing Instructor,
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**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

RYAN D'ERCOLE

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June 21, 2021

The Honorable Elizabeth W. Hanes
United States District Court, Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes,

I am a rising third-year student at Washington & Lee University School of Law, and I am writing to apply for your two-year term law clerk position beginning in 2022. I am a native Virginian, and I would be honored to start my legal career in your chambers.

My legal education and experiences have prepared me to excel as a law clerk. Last summer, I worked with U.S. District Judge Anthony Trenga in the Eastern District of Virginia. As a judicial intern, I worked on a fast-moving case in response to state COVID-19 guidelines and wrote briefs assessing how the changing state executive orders impacted the plaintiffs' complaint. Additionally, I worked on a complex class action where I analyzed the differences in tort law in the multiple jurisdictions at issue. Further, my experiences on the *Washington and Lee Law Review* will prepare me to effectively contribute to your chambers. Along with serving as the journal's incoming executive editor, my student note regarding voting rights will be published in the upcoming volume. These experiences have refined my ability to conduct efficient research on complex legal issues and translate that research into concise and effective writing.

My interest in community and public service sets me apart as an applicant. I am active in the local Lexington community through my involvement with the NAACP and local community groups. At the Rockbridge County chapter of the NAACP, I field community complaints of discrimination and registered people of color for the COVID-19 vaccine. Additionally, I coordinated with several local organizations ahead of the 2020 election to register historically disenfranchised groups to vote. I hope to transform this community work into a career in public service. I will spend this summer with the Virginia Office of the Attorney General. After clerking, I plan to apply to several of the Department of Justice honors programs as well as public interest organizations.

I am eager to apply my experience to serve as your law clerk. I have enclosed my resume, writing sample, transcript, and letters of recommendation for your review.

Sincerely,



Ryan D'Ercole

RYAN D'ERCOLE

45 Holly Park Lane #221 • Lexington, VA 24450 • 571-269-7133 • Dercole.r22@law.wlu.edu

EDUCATION

Washington and Lee University School of Law

Lexington, VA

Candidate for Juris Doctor, May 2022 (GPA: 3.701; Top 25%)

- Journal: *Washington and Lee Law Review*, Executive Editor
 - Publication: "Fighting a New Wave of Voter Suppression: How Congress Can Utilize the Twenty-Sixth Amendment's Enforcement Clause to Protect Student Voters" (forthcoming)
- Moot Court: Finalist (Brief)/Quarterfinalist (Oral Arguments), John W. Davis Appellate Advocacy Competition
- Research Assistant: Professor Nora V. Demleitner, Criminal Law & Sentencing
- Additional Involvement: Head Kirgis Fellow (leading the first-year student mentorship program); OutLaw, Co-President (LGBTQ+ law affinity group); Law School Ambassador (assist in recruiting prospective students)
- Honors: Omicron Delta Kappa (National Leadership Honor Society)

Christopher Newport University

Newport News, VA

Bachelor of Arts in Political Science, *cum laude*, 2016

PROFESSIONAL EXPERIENCE

Virginia Office of the Attorney General, Richmond, VA

Summer 2021

Intern, Criminal Appeals Section

Judge Anthony J. Trenga, U.S. District Court for the Eastern District of Virginia, Alexandria, VA

Summer 2020

Judicial Intern

- Drafted memos on issues such as a motion to strike a mandatory minimum sentence and the timeliness of a religious freedom challenge to expiring state Executive Orders issued in response to COVID-19.
- Researched state case law (CA, TX, FL, NY, VA, and WA) to identify whether there is a common law duty for companies to protect consumers' Personally Identifiable Information.
- Drafted order denying motion to vacate, set aside, or correct sentence of person in federal custody.

SimpsonScarborough, Alexandria, VA

2018 – 2019

Business Development Associate

- Worked with the Chief Marketing Officer in a newly created position to establish company-wide sales strategies.
- Managed request for proposal (RFP) response strategy and proposal submission for higher education marketing and consulting services which resulted in over \$7m in billings for the year, achieving 6% year over year growth.
- Collaborated with internal teams to develop custom presentation decks to pitch new business to prospects and personally pitched and won new business for two projects valued at \$380k and \$250k.

Account Executive

2017 – 2018

- Managed day-to-day workflow of market research, brand strategy, and integrated marketing programs for a variety of clients ranging from large public universities to elite private colleges.
- Analyzed, interpreted, and developed positioning recommendations based upon outcomes from quantitative survey research and qualitative interviews and focus group discussions.

Account Executive Intern

2014 – 2016

Sigma Phi Epsilon National Headquarters, Richmond, VA

2016 – 2017

Regional Director, Midwest (Ohio & Michigan)

- Provided educational resources to over 1,100 members and facilitated dozens of in-person workshops on topics including recruitment strategies, executive goal setting, and member safety.

COMMUNITY INVOLVEMENT

Rockbridge County NAACP, Legal Redress Committee; 50 Ways Rockbridge, "Get Out the Vote" Committee; Sigma Phi Epsilon, Undergraduate Mentor & Conference Facilitator

WASHINGTON AND LEE
UNIVERSITY

OFFICE OF THE UNIVERSITY REGISTRAR

Lexington, Virginia 24450-2116

540.458.8455

SSN: ***-**-1236
Student ID: 1741780
Birthdate: 03/24/****

Student's Name: Mr. Ryan M. D'Ercole
D'Ercole, Ryan M.

Entered: 08/12/2019 as LAW:FIRST-YEAR STU

Major:

Current Program: Law

Current Status: On Campus

Date Produced: 06/07/2021

Class: 2022

Other Ed: BA CHRISTOPHER NEWPORT UNIV Newport News VA 23606

	COURSE	ATT	COM	GRADE	POINTS
LAW-FALL SEMESTER 2019-20					
LAW 109	CIVIL PROCEDURE	4.0	4.0	A-	14.68
LAW 140	CONTRACTS	4.0	4.0	B+	13.32
LAW 163	LEGAL RESEARCH	0.5	0.5	A-	1.84
LAW 165	LEGAL WRITING I	2.0	2.0	A-	7.34
LAW 190	TORTS	4.0	4.0	B	12.00
Term	Cmpl Cr: 14.5	GPA Pts: 49.18	GPA Cr: 14.5	GPA: 3.392	
Cumul	Cmpl Cr: 14.5	GPA Pts: 49.18	GPA Cr: 14.5	GPA: 3.392	

The COVID-19 pandemic required significant academic changes. Unusual enrollment patterns and grading reflect the disruption of the time, not necessarily the student's work.

LAW-SPRING SEMESTER 2019-20					
LAW 130	CONSTITUTIONAL LAW	4.0	4.0	CR	0.00
LAW 150	CRIMINAL LAW	3.0	3.0	CR	0.00
LAW 163	LEGAL RESEARCH	0.5	0.5	CR	0.00
LAW 166	LEGAL WRITING II	2.0	2.0	CR	0.00
LAW 179	PROPERTY	4.0	4.0	CR	0.00
LAW 195	TRANSNATIONAL LAW	3.0	3.0	CR	0.00
Term	Cmpl Cr: 16.5	GPA Pts: 0.00	GPA Cr: 0.0	GPA: 0.000	
Year	Cmpl Cr: 31.0	GPA Pts: 49.18	GPA Cr: 14.5	GPA: 3.392	
Cumul	Cmpl Cr: 31.0	GPA Pts: 49.18	GPA Cr: 14.5	GPA: 3.392	

LAW-FALL SEMESTER 2020-21					
LAW 201	ADMINISTRATIVE LAW	3.0	3.0	A-	11.01
LAW 285	EVIDENCE	3.0	3.0	A-	11.01
LAW 301	FOURTH AMENDMENT AND TECH SEM	2.0	2.0	A	8.00
LAW 385P	NEGOTIATION/CONFLICT RES PRAC	2.0	2.0	A	8.00
LAW 392	POVERTY LAW	3.0	3.0	A	12.00
LAW 511	LAW REVIEW	2.0	2.0	CR	0.00
Term	Cmpl Cr: 15.0	GPA Pts: 50.02	GPA Cr: 13.0	GPA: 3.848	
Cumul	Cmpl Cr: 46.0	GPA Pts: 99.20	GPA Cr: 27.5	GPA: 3.607	

LAW-SPRING SEMESTER 2020-21					
LAW 222	MASS MEDIA LAW	3.0	3.0	A	12.00
LAW 300	FED JURISDICTION & PROCEDURE	3.0	3.0	A	12.00
LAW 390	PROFESSIONAL RESPONSIBILITY	3.0	3.0	A	12.00
LAW 428P	TRIAL ADVOCACY PRACTICUM	3.0	3.0	A-	11.01
LAW 511	LAW REVIEW	2.0	2.0	CR	0.00
Term	Cmpl Cr: 14.0	GPA Pts: 47.01	GPA Cr: 12.0	GPA: 3.918	
Year	Cmpl Cr: 29.0	GPA Pts: 97.03	GPA Cr: 25.0	GPA: 3.881	
Cumul	Cmpl Cr: 60.0	GPA Pts: 146.21	GPA Cr: 39.5	GPA: 3.702	

(continued in next column)

	COURSE	ATT	COM	GRADE	POINTS
***** END OF TRANSCRIPT *****					
LAW-FALL SEMESTER 2021-22 CURRENT OR FUTURE REGISTRATION					
LAW 216	BUSINESS ASSOCIATIONS				4.0
LAW 407	SKILLS IMMERSION - LITIGATION				2.0
LAW 412	SENTENCING LAW AND POLICY				3.0
LAW 417P	STATUTORY INTERPRETATION PRAC				4.0
LAW 534	JUDICIAL EXTERNSHIP - STATE				2.0
LAW 534F	JUDICIAL EXTERN:STATE-FD.PLCMT				2.0

James D. K...
Registrar

PAGE 1 of 1

Student No: 00728856

Date of Birth: 24-MAR-1994

Date Issued: 08-JUN-2021

ADV

Record of: Ryan Michael D'Ercole

UNOFFICIAL

Page: 1

Issued To: Ryan D'Ercole

email to: dercole.r22@law.wlu.

Course Level: Undergraduate

Only Admit: Fall Semester 2012

Current Program

College : College of Social Sciences

Major : Political Science

Minor : Leadership Studies

US National Security Studies

SUBJ NO. COURSE TITLE CRED GRD PTS R

Transfer Information continued:

HIST 112 World Civ since mid-16th Cent 3.00 T

MATH 140 Calculus and Analytic Geometry 4.00 T

PSYC 201 Inv Biol Bases of Beh & Cogn 3.00 T

Ehrs: 16.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00

Comments:

By completing the Honors Program, this student has assumed academic responsibilities beyond the ordinary--endeavors essential to success in a profession or a graduate program.

INSTITUTION CREDIT:

Fall Semester 2012

College of Social Sciences

Political Science

First-time Student

Degrees Awarded Bachelor of Arts 14-MAY-2016

Primary Degree

Major : Political Science

Minor : Leadership Studies

US National Security Studies

Inst. Honors: Cum Laude

GOVT 100 Political Thought and Society 3.00 A 12.00

GOVT 215 Comptv & Intl Politics 3.00 A 12.00

HONR 010 First Year Activities 0.00 P 0.00 I

HONR 100 The Conquest of Mexico 3.00 B+ 9.00

LDSP 210 Self, Group, and Leadership 3.00 B 9.00

SPAN 200 Eff Comm in Spanish 3.00 A- 11.10

Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 54.00 GPA: 3.60

SUBJ NO. COURSE TITLE CRED GRD PTS R

TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:

Academic Dean's List

Good Standing

SP12

AP Credit

GOVT 101 Power and Politics in America 3.00 T

HIST 111 Word Civ 1715 to Present 3.00 T

***** CONTINUED ON NEXT COLUMN *****


Spring Semester 2013

College of Social Sciences

Political Science

Continuing Student

***** CONTINUED ON PAGE 2 *****


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 Register@cnu.edu
 Unofficial Transcript

Student No: 00728856

Date of Birth: 24-MAR-1994

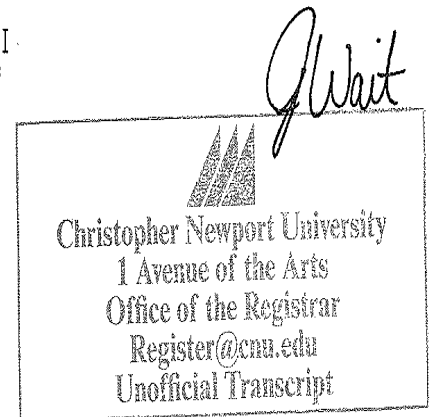
Date Issued: 08-JUN-2021
ADV

Record of: Ryan Michael D'Ercole
Level: Undergraduate

UNOFFICIAL

Page: 2

SUBJ NO.	COURSE TITLE	CRED	GRD	PTS	R	SUBJ NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						Institution Information continued:					
GOVT 320	Religion & Politics in America	3.00	B+	9.90							
HONR 010	First Year Activities	0.00	P	0.00	I	Spring Semester 2014					
HONR 310	Understanding War & Peace	3.00	B+	9.90		College of Social Sciences					
LDSP 230	Leadership Through the Ages	3.00	A-	11.10		Political Science					
MATH 125	Elementary Statistics	3.00	A	12.00		Continuing Student					
SPAN 202	Intermediate Spanish II	3.00	B	9.00		GOVT 329	International Human Rights	3.00	A-	11.10	
Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 51.90 GPA: 3.46						GOVT 350	Latin Ame Politics & Societies	3.00	B+	9.90	
Good Standing						HONR 020	Second Year Activities	0.00	P	0.00	I
						HONR 326	Violence and Civilization	3.00	A	12.00	
Fall Semester 2013						LDSP 306	Values Leadership	3.00	A-	11.10	
College of Social Sciences						PHYS 141	How Things Work	3.00	A	12.00	
Political Science						Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 56.10 GPA: 3.74					
Continuing Student						Academic Dean's List					
AMST 100	The American Experiment	3.00	A	12.00		Good Standing					
GOVT 338	Polit of Weapons Proliferation	3.00	A	12.00							
GOVT 352	Rsrch Methds & Quant Analysis	3.00	A	12.00		Fall Semester 2014					
HONR 020	Second Year Activities	0.00	P	0.00	I	College of Social Sciences					
HONR 350	The Legal Voice	3.00	A	12.00		Political Science					
LDSP 310	Leadership Theory and Research	3.00	B+	9.90		Continuing Student					
Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 57.90 GPA: 3.86						AMST 300	The American Exp: Global Infl	3.00	A	12.00	
Academic Dean's List						GOVT 330	Middle Eastern Politics	3.00	A	12.00	
Good Standing						GOVT 340	Might and Right Among Nations	3.00	A-	11.10	
***** CONTINUED ON NEXT COLUMN *****						HONR 030	Third Year Activities	0.00	P	0.00	I
***** CONTINUED ON PAGE 3 *****											



Student No: 00728856

Date of Birth: 24-MAR-1994

Date Issued: 08-JUN-2021

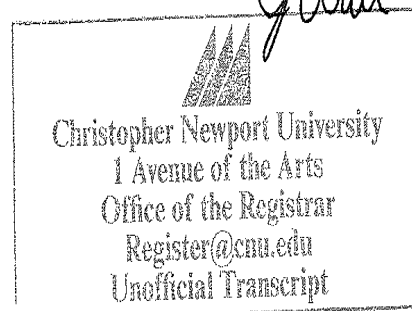
ADV

Record of: Ryan Michael D'Ercole
Level: Undergraduate

U N O F F I C I A L

Page: 3

SUBJ NO.	COURSE TITLE	CRED	GRD	PTS	R	SUBJ NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:				Institution Information continued:							
LDSP 384	Leading Change	3.00	A-	11.10		GEOG 202	Introduction to Geography II	3.00	A-	11.10	
PHYS 105L	Elementary Physics Lab	1.00	A	4.00		GOVT 381	International Political Economy	3.00	AU	0.00	
Ehrs: 13.00 GPA-Hrs: 13.00 QPts: 50.20 GPA: 3.86				GOVT 454 American Political Behavior 3.00 A- 11.10							
Academic Dean's List				GOVT 490 WI: Senior Seminar in Pol Sci 3.00 A- 11.10							
Good Standing				HONR 040 Fourth Year Activities 0.00 P 0.00 I							
				HONR 382 HNRS: Civic Engagement 3.00 A 12.00 I							
				Ehrs: 12.00 GPA-Hrs: 12.00 QPts: 45.30 GPA: 3.77							
Spring Semester 2015				Good Standing							
College of Social Sciences											
Political Science											
Continuing Student				Spring Semester 2016							
GOVT 353	East Asian Politics	3.00	B+	9.90		College of Social Sciences					
GOVT 371	WI: Public Admin & Policy	3.00	P	0.00		Political Science					
GOVT 410	Ethnic Conflict & Nationalism	3.00	P	0.00		Continuing Student					
HONR 030	Third Year Activities	0.00	P	0.00	I	COMM 201	Public Speaking	3.00	A	12.00	
HONR 490	HNRS WI: Probl in Modern World	3.00	B	9.00		GOVT 354	Political Campaigns/Elections	3.00	B	9.00	
Ehrs: 12.00 GPA-Hrs: 6.00 QPts: 18.90 GPA: 3.15				GOVT 395 Sp Tpc: West European Politics 3.00 P 0.00							
Good Standing				HONR 040 Fourth Year Activities 0.00 P 0.00 I							
				HONR 382 HNRS: Civic Engagement 0.00 A 0.00 I							
				HONR 484 Honors Portfolio 1.00 A 4.00							
Fall Semester 2015				LDSP 491 WI: Leadership Internship Sem 3.00 A- 11.10							
College of Social Sciences				Ehrs: 13.00 GPA-Hrs: 10.00 QPts: 36.10 GPA: 3.61							
Political Science				Academic Dean's List							
Continuing Student				Good Standing							
***** CONTINUED ON NEXT COLUMN *****				***** CONTINUED ON PAGE 4 *****							



Student No: 00728856

Date of Birth: 24-MAR-1994

Date Issued: 08-JUN-2021
ADV

Record of: Ryan Michael D'Ercole
Level: Undergraduate

U N O F F I C I A L

Page: 4

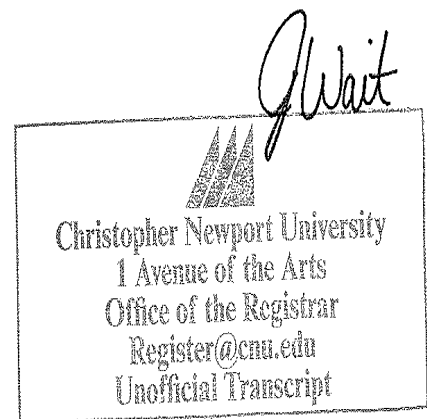
***** TRANSCRIPT TOTALS *****

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	110.00	101.00	370.40	3.66

TOTAL TRANSFER	16.00	0.00	0.00	0.00
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OVERALL	126.00	101.00	370.40	3.66
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***** END OF TRANSCRIPT *****



WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 21, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I most highly recommend Ryan D'Ercole for a clerkship in your chambers. As my student and research assistant, I have gotten to know Ryan both as a professional and a person and could not be more impressed with his legal skills, hard work, and personality.

I first encountered Ryan in the spring of 2020 when he was enrolled in the mandatory first-year Criminal Law course. He sat in the front row, and every class I was struck by his excitement for learning. Not once in 18 months, even during the stress of the pandemic, have I seen Ryan bring anything but good cheer and patience. He is truly a pleasure to work with.

During class Ryan's insights and answers showed strong analytical skills. He analyzed and questioned cases and lines of doctrinal argument. Even when the law school adopted a pass/fail grading scheme for that spring semester, Ryan continued to work hard. It was clear that he was growing into lawyering, which made me hire him as a research assistant at the end of his first year, a position he continues to hold. I remain impressed with both the quantity and the quality of his work.

Last summer Ryan interned for a federal district court judge and worked for me at the same time. He managed his time excellently and went above and beyond my expectations. His research skills clearly improved over the course of the summer, as he worked on several projects that included sentencing issues but also questions about the prevailing legal approaches to prostitution. His summaries of articles and cases were always well written and on point.

In addition to strictly legal research, Ryan has also been working on a large empirical project. I have been impressed with his attention to detail and his thoughtful questions about how to categorize datapoints. Others may have thought the work boring, but he took it as a learning experience and inspiration. Whenever I did not have more other work ready, he would turn to that project to move it forward.

Ryan worked with two other research assistants, and the three organized and managed the workflow. It allowed them to complete all my projects, which ranged from presentations to detailed state statutory and constitutional analysis, on time and be actively engaged in the law school community. Over the year, they worked on both large projects with longer deadlines and some questions that required a speedy turnaround. Not once did Ryan disappoint. Let me emphasize that he worked long hours for me while he wrote his Law Review Note which has been selected for publication and participated in moot court where he was a finalist for the best brief. These accolades further attest to his research and writing skills.

Ryan's personality and character have impressed not just me but also other members of the faculty and staff and his classmates. He was selected as a Kirgis Fellow, a high honor with a long tradition at Washington and Lee's Law School. Mentoring incoming law students requires patience and good judgment and presented novel and more difficult challenges in a year of partial remote learning and little in-person interaction. Ryan also served as OutLaw's president, attesting to the esteem in which his classmates hold him, which is also reflected in the current Law Review Board's choice of him as Executive Editor. His ability to work in a high-functioning team and support and encourage the other members will serve him well both on the Law Review board and in chambers.

In addition to his academic and extracurricular pursuits in Law School, Ryan also found time to volunteer in the local community. Much of that work, as his Law Review Note, is focused on voting rights and get-out-the-vote strategies, areas that gave captured his academic attention and his heart. Yet, everything he does, however far removed from these issues, he does with the excitement of someone who always wants to learn more and fulfill the expectations placed in him.

Ryan worked for three years after college, which is reflected in his strong organizational skills. In the workplace, even in a short time he accomplished significant results, which further testifies to his drive and hard work.

Nora Demleitner - demleitner@wlu.edu - 540-458-8502

Ryan is a Virginian and hopes to make his legal career in the State. His academic experiences but also his work have been here. While he has not decided on the career step following the clerkship, both appellate work and public service are in his future.

Whatever expectations you may have for a clerk, Ryan would surpass them. His writing and research skills make him a competitive candidate, but it is his winning personality, including his organizational aptitude and his ability to contribute as member of a team, that make him outstanding.

I am at your disposal and hope Ryan will have the opportunity to impress you himself.

Sincerely,

Nora V. Demleitner
Roy L. Steinheimer Jr. Professor of Law
516-639-7505 (cell)
demleitn@wlu.edu

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 21, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to strongly recommend Ryan D'Ercole for a judicial clerkship in your chambers. I've known Ryan since his first year at Washington and Lee University School of Law, when he was enrolled in my Constitutional Law class. Since then, I've had Ryan in a seminar I teach as well as the opportunity to interact with him on multiple occasions. Ryan is brilliant, enthusiastic, and would make an outstanding law clerk.

Ryan's performance in Constitutional Law was truly exceptional. He was meticulously prepared for class. Ryan engaged wholeheartedly in class discussion, always willing to tackle a difficult hypothetical or talk through the application of any constitutional doctrine to the facts. His thoughtful questions and detailed analysis added real value to our class's discussions. Even if Ryan made an error (a rare event, to be sure), he always saw it as an opportunity to learn something or review his understanding of the material. He occasionally sent me interesting articles that he thought might be relevant to our class's discussions, including one discussing the Fifth Circuit's rulings on abortion clinics at the start of the COVID-19 Pandemic. It helped enrich our course discussions. The spring of 2020 was a challenging time at all universities, Washington and Lee Law included. Despite the challenging and abrupt switch to virtual education, Ryan maintained his engagement with the course, especially when we started discussing voting rights, a subject that Ryan is deeply interested in. Like many law schools, Washington and Lee Law graded students on a Credit/No Credit basis that spring, so I was unable to assign Ryan a letter grade. Even with all the obstacles that the switch to virtual learning brought, Ryan did outstanding work on his exam. He had an impressive grasp of the course material, including an especially good Equal Protection Clause analysis.

I was delighted to see Ryan in my seminar the following fall. The seminar addresses the intersection of the Fourth Amendment and developing technology, and the ways in which courts and legislatures have attempted to address these tricky issues. Ryan excelled in class. He was able to apply the Fourth Amendment to complicated new fact patterns and understand and explain developing technology. Class discussion entered into difficult and occasionally controversial areas involving privacy and policing choices. Just as in Constitutional Law, Ryan was respectful of his peers and inclusive in conversation, acknowledging his colleagues' contributions and advocating for his positions with determination and civility. Ryan wrote an outstanding paper for the seminar addressing the intersection between predictive policing and poverty, an area that has yet to be explored thoroughly. During all of our meetings to discuss his paper—a requirement of the course—Ryan was well prepared with research so we could get into the substantive details of his paper. In addition to thorough research and excellent analysis, Ryan's writing is quite good. Indeed, on the draft I had to review as part of the seminar, I was hard pressed to find errors or suggestions. He's expressed interest in expanding it in the future and seeking publication, and has committed to doing that work during his third year in law school.

As part of the seminar, students were required to provide a substantive peer evaluation of a colleague's work in progress. Ryan offered an in-depth constructive critique of the substance of his colleague's paper, rather than just writing style. He identified where his colleague had made strong arguments and offered suggestions where his colleague could expand arguments or make them stronger. His feedback was always appropriately framed and encouraging—useful skills in the collaborative environment of judicial chambers. Ryan also takes feedback well. He's got the enthusiasm

Ryan has excelled in other writing assignments and tasks. Ryan's student Note, *Fighting a New Wave of Voter Suppression: Securing College Students' Right to Vote Through the Twenty-Sixth Amendment's Enforcement Clause*, was selected for publication. I was not surprised at all—Ryan's clear, logical writing and persuasive arguments are truly compelling. His research, in everything I have seen him do, is thorough. Ryan has a passion for the intricacies of the laws surrounding voting and a strong interest in public service in that area of law. He was also a finalist in the brief-writing component for the John W. Davis Appellate Advocacy Competition. I believe that Ryan will be an outstanding member of the legal profession given his excellent advocacy skills, strong writing talents, and commitment to justice.

Alex Klein - aklein@wlu.edu

In addition to Ryan's excellent academic credentials, he's also a great person who unhesitatingly shares his talents and expertise to better the Washington and Lee community. He's consistently courteous, trustworthy, and responsible. He is a mentor to first-year law students in the Kirgis Fellows Program, and many of the first-year students I teach have expressed their appreciation for Ryan's kindness, support, and encouragement. Ryan was selected as one of the Executive Editors of the Washington and Lee Law Review for the 2021–2022 academic year. It's a position that requires strong collaborative and leadership skills. I expect Ryan to truly shine in that position. Ryan was inducted into Omnicron Delta Kappa, another mark of how highly many of my colleagues and his peers think of him.

I strongly encourage you to consider Ryan's application. Please feel free to contact me at any time at 540-458-8330, or 540-294-6552, or at aklein@wlu.edu if you have any questions, or if there is any other information I can provide about Ryan's qualifications and abilities for a clerkship in your chambers.

Sincerely,

Alexandra Klein
Visiting Assistant Professor of Law

Alex Klein - aklein@wlu.edu

RYAN D'ERCOLE

45 Holly Park Lane #221 · Lexington, VA 24450 · (571) 269-7133 · Dercole.r22@law.wlu.edu

WRITING SAMPLE

I prepared the attached brief for the Fall 2020 John W. Davis Appellate Advocacy Competition at Washington and Lee University. In the case *United States v. Martin*, I was assigned to represent the United States as the Petitioner in its appeal to the United States Supreme Court from a ruling by the fictional “Thirteenth Circuit.” For conciseness, I have only provided my analysis on the first issue raised on appeal: whether 18 U.S.C. § 1114—the statute under which the Respondent was indicted—applies extraterritorially.

The Respondent, Pierre Martin, was arrested for the killing of FBI Special Agent Doug Horowitz. Horowitz was in Canada on assignment for the FBI when he was found dead in his hotel room. An autopsy revealed that Horowitz was poisoned, but no suspects were immediately apprehended. Approximately one month later, Martin—a Canadian citizen attending graduate school in the United States—was stopped in the United States by local police for an unrelated matter. During that stop, police found evidence that linked Martin to the killing of Agent Horowitz, and Martin was charged under 18 U.S.C. § 1114:

Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished.

Martin challenged the applicability of § 1114 to the alleged conduct, which occurred outside the United States. After the district court found that § 1114 was applicable extraterritorially, Martin entered a conditional guilty plea. The Thirteenth Circuit reversed. The matter is now on appeal before the Supreme Court.

I. 18 U.S.C. § 1114, Which Criminalizes the Killing of “Any Officer or Employee of the United States,” Applies Extraterritorially

The text and context of 18 U.S.C. § 1114 rebuts the general presumption against extraterritorial application of criminal statutes. It is well established that Congress has the authority to enact laws that apply to conduct occurring outside of the United States. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). Whether Congress has exercised this authority “is a matter of statutory construction.” *Id.*

While statutes are generally presumed to apply only within the boundaries of the United States, this presumption is rebutted if Congress provides a “clear, affirmative indication that [the statute] applies extraterritorially.” *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016). However, an “express statement of extraterritoriality is not essential,” and “context” alone may be sufficient to provide the required “clear indication.” *Id.* at 2102.

Under this Court’s ruling in *United States v. Bowman*, 260 U.S. 94 (1922), a criminal statute applies extraterritorially when it meets two criteria. First, the statute was enacted with the purpose of allowing “the Government to defend itself from obstruction.” *Id.* at 98–99. Second, the statute criminalizes an offense that is probable would occur in jurisdictions outside of the United States. *Id.*

Stare decisis principles support *Bowman*’s continued validity and its applicability for assessing the extraterritorial effect of criminal statutes such as § 1114. The Thirteenth Circuit erred in applying this Court’s more recent test from civil cases. Correctly applying *Bowman*, § 1114 satisfies the test and thus must apply extraterritorially.

A. *United States v. Bowman* remains good law and is the appropriate approach to assess the extraterritoriality of 18 U.S.C. § 1114.

The doctrine of *stare decisis* supports the continued application of *United States v. Bowman* when assessing the extraterritoriality of criminal laws. *Stare decisis* promotes “stability, predictability, and respect for judicial authority.” *Hilton v. South Carolina Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991). Therefore, there must be a “compelling justification” for overruling a prior decision. *Id.* When reconsidering precedent, the Court assesses a number of factors, among them: “the quality of [the decision’s] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.” *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478–79 (2018). While *Bowman* was decided nearly a century ago, its reasoning is consistent with this Court’s recent pronouncements on the presumption against extraterritoriality and how a statute might rebut the presumption. Its two-part test natural fits within the current framework articulated by the court more recently in *Morrison v. National Australian Bank Ltd.*, 561 U.S. 247 (2010), and *RJR Nabisco*. Additionally, *Bowman* has proven to be a workable standard that lower courts have applied to reach logical conclusions.

1. *Bowman*’s reasoning is consistent with this Court’s more recent discussion of the presumption and fits into the *Morrison* and *RJR Nabisco* framework.

The distinction this Court acknowledged in *Bowman* between civil and criminal laws when applying the presumption against extraterritoriality aligns with this Court’s modern understanding of the presumption and its underpinnings. In *Bowman*, this Court noted that “the same rule [against extraterritoriality] should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government’s jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated.” *Bowman*, 260 U.S. at 98. This distinction—that criminal statutes face a less stringent presumption than civil

statutes—squares with the Court’s more recent explanation of the purpose of the presumption against extraterritoriality. The Court has identified two core reasons for this presumption. First, the presumption ensures that courts “avoid the international discord that can result when U.S. law is applied to conduct in foreign countries.” *RJR Nabisco*, 136 S. Ct. at 2100. Second, it vindicates the fundamental precept that “Congress ordinarily legislates with respect to domestic, not foreign, matters.” *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 250 (2010).

Bowman correctly concludes that these two principles are less prevalent in instances of criminal action taken against the Government. First, concerns about international discord are not as significant when applying a statute that criminalizes offenses aimed at the United States Government or its officials. International discord likely already exists due the perpetuation of the crime and is likely resolved prior to trial. *See United States v. Leija-Sanchez*, 602 F.3d 797, 801–02 (7th Cir. 2010) (noting that the “international repercussions” of the decision to prosecute the defendants for the murder occurring in Mexico were already resolved by the “political branches” when the co-defendants were apprehended in Mexico and extradited to the United States). Second, when Congress legislates with the purpose of protecting the Government from crimes taken against it, it is reasonable to expect that Congress intends for that legislation to apply to actions taken both domestically and abroad. *See United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991) (“For such crimes, limiting jurisdiction to the territorial bounds of the United States would greatly curtail the scope and usefulness of the penal statutes.”) (citing *Bowman*, 260 U.S. at 98)). As a result, the Court’s more recent decisions in *Morrison* and *RJR Nabisco*—which apply a more stringent presumption to civil cases—do not limit the force of the *Bowman*, which was based on the understanding that Congress is more likely to intend for the extraterritorial application of criminal laws that implicate the Government’s right to defend itself.